**Stephens Media Group–Watertown, LLC and Stephens Media Group–Massena, LLC *and* National Association of Broadcast Employees and Technicians–Communications Workers of America, AFL–CIO.** Cases 03–CA–226225, 03–CA–227924 and 03–CA–227946

July 22, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On January 24, 2020, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel and Charging Party Union filed answering briefs, and the Respondents filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, to amend the judge's remedy,[3] and to adopt the judge's

[1] No party has excepted to the judge's finding that Respondent Stephens Media Group–Watertown, LLC (SMG–Watertown) did not violate Sec. 8(a)(5) by accelerating its acceptance of employee Ashley Tracey's resignation. In addition, there are no exceptions to the judge's dismissal of the allegations that SMG–Watertown engaged in unlawful direct dealing by soliciting employee Jeffrey Shannon to expand his once-weekly Z93 Wind Show commitment to twice-weekly, that it engaged in unlawful surface bargaining, or that it unlawfully delayed in providing requested relevant information.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The remedy section of the judge's decision provides that SMG–Watertown is to make whole its unit employees for any loss of wages or other benefits suffered as a result of its unlawful unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The *Ogle Protection* formula, however, "applies only to remedy a violation of the Act that does not involve cessation or denial of employment." *CAB Associates*, 340 NLRB 1391, 1393 (2003). Thus, to the extent SMG–Watertown's unlawful unilateral changes resulted in employees being laid off or otherwise separated from employment, any make-whole amounts shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *Raven Government Services*, 336 NLRB 991, 992 (2001), enfd. 315 F.3d 499 (5th Cir. 2002). Under both backpay-computation methods, interest shall be computed at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall order SMG–Watertown to compensate affected employees for their reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, we shall order SMG–Watertown to file with the Regional Director for Region 3 copies of any corresponding W-2 forms reflecting backpay awards, in accordance with *Cascades Containerboard Packaging–Niagara,* 370 NLRB No. 76 (2021).

Although the judge's remedy implicitly requires reinstatement of certain employees, we shall affirmatively order SMG–Watertown to offer any employees who may have been laid off or otherwise separated from employment due to its unlawful unilateral changes full reinstatement to their former jobs or, if those jobs cannot be reinstituted for reasons unrelated to their unlawful elimination, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Contrary to her colleagues, and for the reasons set forth in her dissent in *American Security Programs*, 368 NLRB No. 151 (2019), Chairman McFerran would issue the Board's traditional bargaining order to remedy the Sec. 8(a)(5) unlawful premature declaration-of-impasse and unilateral change violations found here.

To further remedy SMG–Watertown's unlawful unilateral changes, we will order it to restore all terms and conditions of employment for unit employees that existed prior to those changes (but not if a change improved employees' terms and conditions, unless the Union so requests), and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining.

The Respondents argue on exceptions that they should be permitted to introduce evidence in compliance that this remedy would be unduly burdensome. Although evidence of undue burden that was available at the time of the merits hearing may not be introduced at compliance, the Board has long recognized that changed circumstances after the record was closed may render a restoration remedy no longer appropriate. Consistent with longstanding precedent, therefore, the Respondents may introduce evidence in compliance proceedings that this remedy would now be unduly burdensome, provided that such evidence was unavailable at the time of the unfair labor practice hearing. See, e.g., *St. Vincent Medical Center*, 349 NLRB 365, 367 fn. 5 (2007); *We Can, Inc.*, 315 NLRB 170, 175 (1994); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989). Even if, as our colleague contends, the cases in which the Board has said that undue burden may be litigated at compliance typically involve operational changes more sweeping than in this case, the dissent cites no case for the proposition that allowing undue burden to be litigated at compliance is limited to such cases as a matter of law, and we have found none. Similarly, although the employer in *We Can* referred to posthearing events bearing on undue burden in a motion to reopen the record, nothing in the Board's decision in that or any other case indicates that the availability of compliance proceedings to litigate undue burden *depends* on

recommended Order as modified and set forth in full below.[4]

Stephens Media Group (SMG) operates radio stations throughout the United States, and it has owned the Massena and Watertown, New York stations since 2008. We agree with the judge's findings, for the reasons stated in his decision, that Respondent SMG–Watertown violated Section 8(a)(5) and (1) of the National Labor Relations Act by making unilateral changes, including layoffs,[5] in the absence of a valid impasse in negotiations for a successor collective-bargaining agreement, and that it engaged in unlawful direct dealing by offering employee Michael Stoffel a position as production and social media director for SMG–Watertown. We also find that SMG–Watertown violated Section 8(a)(1) of the Act by interrogating employee Frank Laverghetta about his union activities. However, as set forth below, we reverse the judge's findings that Respondent Stephens Media Group–Massena, LLC (SMG–Massena) violated Section 8(a)(5) and (1) of the Act by refusing to meet at reasonable times to negotiate a successor agreement for the Massena bargaining unit and violated Section 8(a)(3) and (1) of the Act when it discharged employee David Romigh on June 6, 2018.[6]

1. In finding that SMG–Massena violated Section 8(a)(5) by refusing to meet with the Union to negotiate a successor agreement for the Massena unit, the judge relied heavily on the Respondents' conduct leading up to their declaration of impasse on August 22. However, the complaint alleges that the unlawful refusal to meet occurred after September 10, so the issue is whether SMG–Massena's failure to meet with the Union for 6 weeks—from September 10 until the parties' final bargaining session on October 22—was unlawful. Moreover, in finding that SMG–Massena's failure to meet with the Union was unlawful, the judge did not rely on the 6-week delay from September 10 to October 22. Rather, he found that the Respondents' negotiator, Michael King, *never* met with the Union to negotiate a successor contract for the Massena unit. The evidence is to the contrary. King met with union representative Ron Gabalski on October 22. The sign-in sheet for that meeting was headed "Negotiations for Stephens Media Watertown and NABET-CWA," but King added "Massena" at the top of the sheet and asked whether the representative for the Massena unit was present. Gabalski assured King that he had the authority to bargain for both the Watertown and Massena contracts, and the parties commenced bargaining. We find that when they did so, the parties were negotiating successor contracts for both units.

On September 10 and 21, Gabalski asked King to provide dates to bargain for the Massena contract, and King did not do so. At that time, however, King believed that the parties were at impasse. The judge found, and we agree, that the parties were not at impasse, but the judge also found that King's belief that impasse had been reached, although erroneous, was sincere. King therefore believed, in good faith, that his duty to meet with the Union had been suspended. See, e.g., *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 20 (D.C. Cir. 2012) ("The

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presenting an undue-burden argument prior to compliance, whether by way of a motion to reopen or on exceptions.

Chairman McFerran would not grant the Respondents' request for permission to introduce evidence at the compliance hearing that rescinding its unlawful unilateral changes would be unduly burdensome. The cases cited by her colleagues, are distinguishable. *St. Vincent* and *Lear Siegler*, supra, involved fundamental changes to the employers' businesses, unlike the unilateral changes here. See *Lear Siegler*, 295 NLRB at 857 (employer ceased and transferred operations from one of its plants to another, subcontracted out the entirety of its warehousing functions, and laid off all of its full-time production employees); *St. Vincent*, 349 NLRB 365 (employer discharged an entire respiratory therapy department and subcontracted the 27 former therapists' work). In both cases, the employers were permitted to introduce evidence that restoring the status quo would be "unduly burdensome" because it would involve reinstituting a plant or department that had been closed. In contrast to the fundamental changes involved in those cases, the Respondents' implementation of their modernization plan resulted in the lay-offs of four full-time on-air employees (a portion of its employees), reduced the weekend shift and hours of two part-time employees, and removed voiceover work to one supervisor. *We Can*, supra, is also distinguishable. There the Board found that the respondent's firing of 8 of its 11 drivers in retaliation for their union organizing activity violated Sec. 8(a)(3) and rejected as pretextual the respondent's claim that the mass firing was consistent with its restructuring plan to reduce the number of drivers. In a posthearing motion to reopen the record, the respondent referenced that since the hearing, it had ceased operations and its trucks had been repossessed. In affirming the judge's recommended Order, the Board stated that "restoration and reinstatement will be required *unless* the [r]espondent can establish at compliance—on the basis of evidence that was not available at the time of the unfair labor practice hearing—that those remedies are inappropriate." The respondent in *We Can* provided argument, including evidence regarding the closure of its operations, to support its request, whereas here, the Respondents have provided no argument or evidence in its exceptions brief or in a posthearing motion, to support a similar request.

[4] We shall modify the judge's conclusions of law and recommended Order to conform to our findings and the Board's standard remedial language, and in accordance with our decision in *Cascades Containerboard,* supra, and *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and we have substituted a new notice to conform to the Order as modified.

[5] SMG–Watertown argues that the Union waived bargaining over layoffs. We reject this argument because SMG–Watertown never presented it to the judge but instead raised it for the first time on exceptions. *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) ("A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived."), enfd. 922 F.2d 832 (3rd Cir. 1990); *Armour Con Agra*, 291 NLRB 962, 962 fn. 1 (1988). In any event, there is no evidence that the Union waived bargaining over layoffs.

[6] Unless otherwise noted, all subsequent dates are 2018.

bargaining obligation is suspended temporarily when the parties reach a lawful impasse."). Depending upon the circumstances, a 6-week failure to meet may violate Section 8(a)(5). See *Northeastern Indiana Broadcasting Co., Inc.*, 88 NLRB 1381, 1390–1391 (1950) (finding 5-week failure to meet unlawful). However, "[t]he Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times." *Garden Ridge Management*, 347 NLRB 131, 132 (2006). Under the circumstances here—a negotiator who delayed meeting with his union counterpart for 6 weeks based on a mistaken but sincere belief that negotiations had reached impasse over the critical issue of layoffs—we find that SMG–Massena did not violate Section 8(a)(5) as alleged.[7]

2. For the following reasons, we also find that SMG–Massena did not violate Section 8(a)(3) when it discharged David Romigh.

Facts

Beginning in April 2016, Romigh was the "morning drive" disc jockey at SMG's Massena AM station. His show ran from 6:00 a.m. until noon on weekdays, but he was required to report to work at 4:30 a.m. Romigh also served as union steward for the Massena unit. Massena Program Director Todd Truax supervised Romigh until February 2018. Truax reported to Station Manager Jason Sharlow and Glenn Curry, general manager for both Massena and Watertown stations. Curry was based in Watertown and spent only 1 day a week at the Massena station. When Truax left, Sharlow became Massena program director and Romigh's direct supervisor.

Romigh was a talented on-air personality but a problematic employee in other respects. He occasionally fell asleep during his show, resulting in periods of "dead air." Truax spoke with Romigh about this, but he was unsure if he had the authority to discipline him. Romigh also sometimes arrived late and left early. Truax spoke to him about this as well, and he corrected Romigh's timesheets on two occasions after discovering that Romigh had misreported his arrival and departure times.

In September 2017, while working a second job at Home Depot, Romigh told a customer that he hated airing advertisements for a local hospital and only did so because his job required it. The customer turned out to be the

[7] The dissent mischaracterizes our rationale, claiming we hold that a good-faith mistaken belief that impasse has been reached suspends the duty to meet. We have said no such thing. Moreover, to find a violation, our colleague would rely on events beginning June 7. Again, the complaint allegation is that the Respondent refused to meet to negotiate the Massena contract *after September 10*. While the Chairman is free to consider events predating September 10 as background, they cannot form the predominant basis for establishing a violation. See *Maritime Union District 1 (Mormac Marine Transport*), 312 NLRB 944, 944 fn. 3 (1993). But even considering earlier events, we would reach the same conclusion. The Respondents initially proposed negotiating the Watertown and Massena contracts together. The Union declined, and the parties subsequently agreed to an initial bargaining schedule of Watertown on August 15 and Massena on August 16, with August 17 held open if needed. The Respondents permitted Massena steward Romigh to attend the bargaining sessions on August 16 and August 17, despite having recently discharged him, so that he could represent the Massena unit's interests during bargaining. Although the parties did not separately bargain for the Massena unit during these dates as planned, there is no evidence that this stemmed from any refusal to do so by the Respondents. Rather, it appears that the parties never reached Massena-specific bargaining because the discussions focused on more pressing issues related to the Respondents' imminent modernization plans affecting both units.

Contrary to her colleagues, Chairman McFerran would affirm the judge's finding that SMG–Massena violated Sec. 8(a)(5) by failing to meet and bargain with the Union over the Massena agreement. In her view, the judge, consistent with longstanding case law, properly considered the totality of the circumstances, including the parties' bargaining conduct before and after the Respondents' unlawful declaration of impasse on August 22, 2018. *Garden Ridge Management, Inc.*, 347 NLRB 131, 132 (2006) (Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times) citing *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998).

Chairman McFerran disagrees with her colleagues that SMG–Massena was excused from responding to the Union's September 10 and September 21 *post-impasse* requests to bargain over the Massena contract. In contrast to *Erie Brush*, supra, which involved a *lawful* impasse, here, as the Board finds, the Respondents' violated Sec. 8(a)(5) by declaring impasse on August 22. King's "good faith"—but legally incorrect— belief that the parties were at impasse did not operate to "suspend" SMG–Massena's duty to meet. Accordingly, in Chairman McFerran's view, whether the parties' entire course of conduct during the 2018 negotiations is considered or whether the inquiry is limited to the 6-week period post-impasse, the fact remains that the Union made requests for face-to-face bargaining dates both before and after impasse. The Respondents' failure to respond was unlawful. See *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115–1116 (1999) ("The statutory requirement to meet at reasonable times cannot be fulfilled where a party never meets to bargain a contract.").

Finally, contrary to her colleagues, Chairman McFerran would not conclude that the Union somehow agreed to merge bargaining on October 22. The majority cites King's handwritten addition of "Massena" to the top of the October 22 sign-in sheet titled, "Negotiations for Stephens Media Watertown and NABET-CWA," after Gabalski's response to King's rhetorical question about whether Gabalski was the Union's primary negotiator for both contracts (true since June). But as the judge found, the Union—beginning on June 7, when King first raised using the Watertown contract as the "baseline" for both contracts and merging the contracts—consistently rebuffed the idea, noting that the contracts contained different terms and involved different units, that the contracts had historically been bargained separately, and that the subject of merged bargaining was permissive, as it would involve a change in unit scope. When Gabalski took over after Murray's retirement in June, King again asked if the Union would agree to merge bargaining and the contracts; Gabalski denied these requests by June 19 email, asserting that the subject was permissive. Accordingly, in Chairman McFerran's view, it is highly implausible that the Union's consistent and clear position regarding separate bargaining suddenly changed on October 22—and was manifested in a meeting sign-in sheet.

secretary to the hospital's CEO and complained to the station. The hospital was the Massena station's second-biggest sponsor and had been advertising on the station since 1946. Curry and Sharlow apologized to the CEO's secretary, and a written discipline was placed in Romigh's personnel file.

After Sharlow became Massena program director (and Romigh's direct supervisor), he frequently monitored the station's broadcasts. Sharlow noticed periods of dead air during Romigh's show, sometimes lasting as long as 15 minutes and prompting calls from concerned listeners. Sharlow observed other problems with Romigh's work, including his failure to record commercials for sponsors, his refusal to record promotional spots for the station, and his conflicts with another on-air personality. Sharlow reported Romigh's performance issues to Curry and spoke to Romigh about them. Like Truax, however, Sharlow did not think it was his job to issue formal discipline.

In April, Romigh, ostensibly in his capacity as union steward for the Massena unit, told Massena employees that Curry was under investigation for sexually harassing a couple of employees in Watertown and was required to take anger management training. Curry had been involved in a verbal altercation with a Watertown employee and did take anger management training, but the incident was not alleged to involve sexual harassment. Sharlow told Curry that Romigh was spreading rumors about him, including that the Union was looking to remove Curry from his position.

On May 11, Romigh failed to appear for a live remote broadcast at a local venue, the Port Theater. According to Sharlow, when asked why he failed to show up for the Port Theater engagement, Romigh replied that "he didn't feel like it." The Port Theater was the Massena station's third-biggest sponsor, and the station had publicized Romigh's appearance at the event. Curry and Sharlow apologized to the theater and offered a substantial amount of free advertising to retain its business. Another disciplinary form was placed in Romigh's personnel file.

A week later, on May 18, Sharlow reported to Curry that Romigh was sleeping during his radio broadcast. Curry asked Sharlow to photograph Romigh. Sharlow did so that day, as well as on May 29, when Romigh slept on the job again. Also on May 29, Curry asked an employee to photograph any instances of Romigh showing up to work late. On June 4, the employee took a photo of the station's empty parking lot at 4:56 a.m., thus establishing that Romigh was at least 25 minutes late for his 4:30 shift. Romigh, however, did not disclose this tardy arrival on his timesheet. Finally, on June 8, Romigh fell asleep twice during his broadcast. When Romigh finished his shift, Curry discharged him.

Curry explained to Union President Dianne Chase that he discharged Romigh "based on a series of things," including failing to timely record promotional spots for the station, falsifying timecards, failing to take steps to prevent himself from sleeping during his broadcasts, missing an event without notifying the client beforehand, and spreading false rumors about management. Regarding this last reason, Curry stated that Romigh told unit employees that "the union was looking to remove me as Market Manager of Stephens Media." In a subsequent letter to Chase, Curry said that because of Romigh "spreading rumors" about him, he felt that he was "on a short leash."

## Discussion

The judge found that the General Counsel sustained his initial burden under *Wright Line*.[8] He found that Romigh engaged in protected union activity by telling Massena employees that Curry was under investigation and required to take anger management training. The judge found that the investigation was of interest to unit employees, and he credited Romigh's testimony that he shared the information "because he believed that it was his responsibility to do so as steward." Alternatively, even if Romigh's disclosure was not union activity, the judge found that Curry believed it was, as evidenced by Curry's statements to Chase that Romigh told Massena employees the Union was seeking to have Curry removed from his position. The judge also found that SMG–Massena was aware of Romigh's union activity and harbored animus towards it, citing Curry's statements to Chase that Romigh was "spreading rumors" about him and that the rumors made him feel he was "on a short leash."

The judge then found that SMG–Massena failed to sustain its defense burden under *Wright Line*. Although acknowledging that Romigh was "far from a model employee," the judge observed that SMG–Massena tolerated Romigh's misconduct for a long time and only decided to discharge him after Curry learned that Romigh was "spreading rumors" about him.

We agree with the judge that what Curry referred to as "spreading rumors" about him was activity that Romigh undertook in his role as union steward of the Massena unit and was protected as such.[9] We further agree that Curry's

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[9] SMG–Massena argues that Romigh's conduct was unprotected because his report that Curry was being investigated for sexual harassment was false. This argument is raised for the first time on exceptions and is therefore considered to be waived. *Yorkaire*, supra; *Armour Con Agra*, supra. But even if we were to consider it, we would not find it meritorious, as there is insufficient evidence to support a finding of malice, i.e., that Romigh knew the report was false or spoke with reckless disregard

communications to Union President Chase establish that Romigh's protected conduct was a motivating factor in Curry's decision to discharge him. The key issue here, however, is whether SMG–Massena sustained its burden of proving, by a preponderance of the evidence, that it would have discharged Romigh even in the absence of his union activity. See, e.g., *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). We find that it did.

Like the judge, we recognize that Romigh was a problematic employee long before he was discharged. On the other hand, Romigh was talented, which prompted Curry, repeatedly, to "give him another chance," as he later wrote in a letter to Chase. Moreover, Truax and Sharlow, his direct supervisors, believed—correctly or not—that they did not have the authority to discipline Romigh. But they did not ignore Romigh's misconduct. Truax and Sharlow counseled him repeatedly in what proved to be a vain effort to persuade Romigh to improve. Far from succeeding in their efforts, Romigh went from bad to worse. His failure to show up for the Port Theater engagement because he "didn't feel like it" was an unprecedented dereliction. And it was a costly one for the Respondent, which gave the theater substantial free advertising to retain its business. This was soon followed by another instance of Romigh showing up late for his shift and falsifying his timecard, and more episodes of falling asleep in the middle of his broadcast, including twice the day he was discharged. Despite having been given multiple opportunities to mend his ways, Romigh failed to do so, and nothing in Board law requires an employer to look the other way indefinitely. See *David Saxe Productions, LLC*, 369 NLRB No. 138, slip op. at 4 (2020); see also *Fresno Bee*, 337 NLRB 1161, 1161–1162 (2002) (finding that employer lawfully discharged employee for sleeping on the job where the employee had been previously warned and had been disciplined for other infractions). We find that Curry finally reached his tipping point with Romigh and would have discharged him even absent his "spreading rumors" about Curry. Accordingly, we reverse the judge's decision in relevant part and dismiss the allegation that Romigh's discharge violated the Act.

## AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusions of Law 6 and 9 and renumber the remaining paragraphs accordingly.

2. Add the following as new Conclusion of Law 10:

> Respondent SMG–Massena has not violated the Act in any of the ways alleged in the complaint.

## ORDER

Respondent Stephens Media Group–Watertown, LLC, Watertown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, including whether they are willing to cross a picket line in the event of a strike.

(b) Making unilateral changes to unit employees' terms and conditions of employment at a time when SMG–Watertown and the Union were not at a valid impasse in bargaining.

(c) Bypassing the Union and dealing directly with bargaining unit employees to establish or change their working conditions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All broadcast technicians or engineers, all staff announcers, including announcer-operators employed by Respondent SMG Watertown.

(b) At the Union's request, restore all terms and conditions of employment for unit employees that existed prior to the unilateral changes implemented on or after August 23, 2018, and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining. Nothing in this Order is to be construed as requiring Respondent SMG–Watertown to rescind any unilateral changes that benefited the unit employees unless the Union requests it to do so.

(c) Make whole the unit employees for any losses suffered by reason of the unlawful changes in terms and conditions of employment on or after August 23, 2018, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, offer any unit employees who were laid off or otherwise separated from employment due to Respondent SMG -Watertown's unlawful unilateral changes full reinstatement to their former jobs or, if those jobs cannot be reinstituted for reasons unrelated to their unlawful elimination, to substantially equivalent positions, without prejudice to their

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of whether it was true or false. See *KBO, Inc.,* 315 NLRB 570, 570–571 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996).

seniority or any other rights or privileges previously enjoyed.

(e) Make whole employees who were laid off or otherwise separated from employment for any loss of earnings and other benefits suffered as a result of Respondent SMG–Watertown's unilateral changes in the manner set forth in the remedy section of judge's decision as amended in this decision.

(f) Compensate all affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each affected employee.

(g) File with the Regional Director for Region 3 copies of all affected employees' corresponding W-2 forms reflecting the backpay awards.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful layoffs or separations, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs or separations will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its Watertown, New York facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by SMG–Watertown's authorized representative, shall be posted by SMG–Watertown and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if SMG–Watertown customarily communicates with its employees by such means. Reasonable steps shall be taken by SMG–Watertown to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, SMG–Watertown has gone out of business or closed the involved facilities, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by SMG–Watertown at any time since August 22, 2018.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps SMG–Watertown has taken to comply.

Dated, Washington, D.C. July 22, 2021

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| Lauren McFerran, | Chairman |
| Marvin E. Kaplan, | Member |
| John F. Ring, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[10] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent SMG–Watertown customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities, including whether you are willing to cross a picket line in the event of a strike.

WE WILL NOT unilaterally change our unit employees' terms and conditions of employment without first notifying the National Association of Broadcast Employees and Technicians–Communications Workers of America, AFL–CIO (the Union) and giving it an opportunity to bargain with us.

WE WILL NOT bypass the Union and deal directly with our bargaining unit employees to establish or change their working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All broadcast technicians or engineers, all staff announcers, including announcer-operators employed by Respondent SMG–Watertown.

WE WILL, at the Union's request, restore all terms and conditions of employment for our unit employees that existed prior to the unilateral changes we implemented on or after August 23, 2018, and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining, but WE WILL NOT cancel any unilateral changes that benefited our unit employees unless the Union asks us to do so.

WE WILL make you whole, with interest, for any losses suffered by reason of our unlawful changes in your terms and conditions of employment made on or after August 23, 2018.

WE WILL, within 14 days from the date of the Board's Order, offer any unit employees who were laid off or otherwise separated from employment due to our unlawful unilateral changes full reinstatement to their former jobs or, if those jobs cannot be reinstituted for reasons unrelated to their unlawful elimination, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all affected employees for any loss of earnings and other benefits resulting from our unlawful conduct, less any interim earnings, plus interest, and WE WILL also make you whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate all affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 3 copies of all affected employees' corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs or separations of the affected employees, and WE WILL, within 3 days thereafter, notify them in writing that we have done so and that we will not use the loss of employment will not be used against them in any way.

STEPHENS MEDIA GROUP–WATERTOWN, LLC

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-226225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

*Alicia Pender, Esq.,* for the General Counsel.
*Stephen Andrew, Esq.* and *Renee Williams, Esq. (Andrew & Williams),* of Tulsa, Oklahoma for the Respondents.
*Judiann Chartier (NABET–CWA),* of Washington, DC for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. Disc jockeys conduct broadcasts, especially over the radio, featuring music, talk, and the occasional commercial break to generate revenue. In the past, these broadcasts typically occurred live in a studio, requiring the disc jockey to physically remain in the location for the entirety of the radio show. However, recent enhancements to a technology called "voice tracking" have dramatically altered the traditional setup. Voice tracking allows disc jockeys to prerecord the text of their broadcasts. A computer program then puts that text together with music and commercials to create a complete radio show. Voice tracking allows disc jockeys, in particular the most popular ones, to broadcast in multiple radio markets, irrespective of their physical location, on the same days or even at the same times. To listeners, a voice-tracked broadcast

sounds the same as if it were live and the disc jockey was in the same physical location. A disc jockey also can produce a radio show in far less time utilizing voice tracking, compared to sitting in the studio for the entirety of a live broadcast. The technological efficiencies allow a disc jockey to produce multiple broadcasts in less work hours.

This case arises out of the desire of Stephens Media Group (SMG) to implement upgraded voice tracking at radio stations it owns in Massena and Watertown, New York. The on-air personalities employed there long have been represented by the National Association of Broadcast Employees and Technicians-Communications Workers of America, AFL–CIO (the Union or NABET-CWA). When negotiations for a successor contract began in August 2018, the company advised the Union of its interest in implementing voice tracking to utilize the best radio talent at its stations. It also told the Union that automating its programming might result in initial layoffs. The problem for the company was that the existing contract in Watertown prohibited layoffs for the first year of the agreement and utilized seniority, not talent, as the criterion upon which layoffs were based. Thus, the employer initially proposed that the layoff protection be eliminated and the criterion for layoffs be changed from seniority to "a valid reason to be determined by the company in good faith." The parties bargained for 2-½ days from August 15 to 17, 2018, during which the union simply rejected these proposals. On August 20, the union submitted a counterproposal pursuant to which the company would be allowed to voice track programs, but only on a temporary, as-needed basis without any reduction in bargaining unit size. After receiving the union's response, the employer declared impasse on August 22, 2018, and implemented voice tracking for all programming except morning drive shows. The company almost immediately made numerous unilateral changes to unit employees' working conditions, all of which flowed from the voice-tracking implementation.

On December 11, 2018, the General Counsel, through the Regional Director for Region 3 of the National Labor Relations Board (the Board), issued a consolidated complaint against both SMG–Watertown, LLC (SMG Watertown) and SMG–Massena LLC (SMG Massena) (collectively the Respondents). As to the parties' bargaining for successor contracts, the complaint alleges that SMG Watertown violated Section 8(a)(5) of the National Labor Relations Act (the Act) by prematurely declaring impasse and then unilaterally: (1) laying off four, full-time on-air radio personalities; (2) eliminating the regular shifts and reducing the work hours of other part-time on-air employees; and (3) transferring bargaining unit work to nonunit employees. The complaint further claims that, following its impasse declaration, SMG Watertown bypassed the Union and dealt directly with two disc jockeys. In addition, the complaint alleges SMG Watertown delayed in providing relevant information regarding the layoffs requested by the Union immediately after they occurred. The complaint also contends that SMG Watertown engaged in surface bargaining from May 2 to October 22, 2018. Finally, the complaint alleges that SMG Massena violated Section 8(a)(5) and 8(d) by refusing to meet at reasonable times to negotiate a successor contract.[1]

From August 26 through August 29, 2019, in Watertown, New York, I conducted a trial on the complaint. On October 18, 2019, the General Counsel and the Respondents filed posthearing briefs. On October 19, 2019, the Charging Party filed a posthearing brief.[2]

I conclude that SMG Watertown prematurely declared impasse and made unlawful unilateral changes to unit employees' working conditions thereafter. I also find SMG Watertown engaged in one instance of direct dealing with a unit employee. Finally, I conclude SMG Massena failed to meet at reasonable times to negotiate a successor contract. However, the evidence is insufficient to establish the other, alleged Section 8(a)(5) allegations.

This case does not end there, though, because SMG's conduct in successor contract bargaining is not the entirety of the matter. In April 2016, SMG Massena hired David Romigh as its morning-drive, on-air personality for its AM radio station. Romigh immediately became a union steward. Romigh was talented on air, but had a variety of job performance issues throughout his employment. Nonetheless, at no point did SMG Massena ever discipline Romigh for his issues. In April 2018, Romigh, in his role as union steward, reported to other unit employees that the general manager of the station had been investigated for harassment of a unit employee and ultimately was instructed to take an anger management class. When the general manager learned thereafter that Romigh was "spreading rumors" about him, he ratcheted up his monitoring of Romigh's job performance. On June 8, 2018, the day after the general manager completed his anger management training, he discharged Romigh. In subsequent written communications to the Union, the general manager repeatedly stated that one of the bases for Romigh's discharge was his "spreading rumors" about his supervisor. The General Counsel's complaint alleges that SMG Massena violated Section 8(a)(3) by terminating Romigh for his union and protected concerted activity. I conclude that Romigh engaged in protected union activity of which SMG Massena was aware and towards which it harbored animus. I also find that, although SMG Massena had legitimate business reasons to discharge Romigh, it did not demonstrate that it would have done so absent his protected conduct. Thus, his termination was unlawful.[3]

[1] The complaint was premised upon unfair labor practice charges and amended charges filed by the Union on August 24, September 12, and September 24, 2018, against both SMG Watertown and SMG Massena. The Respondents admitted in their answer to the complaint or at the hearing that the Board has jurisdiction in this case, they are Sec. 2(2), (6), and (7) employers within the meaning of the Act, and the Union is a Sec. 2(5) labor organization.

[2] The Charging Party filed its brief one day late, due to technical difficulties with the Board's e-filing system. I grant the Charging Party's unopposed motion for leave to file a brief out of time.

[3] In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. I largely have placed the citations in footnotes at the end of each paragraph. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen*

## ALLEGED UNFAIR LABOR PRACTICES

### I. THE PARTIES' BARGAINING FOR A SUCCESSOR CONTRACT

### FINDINGS OF FACT

Stephens Media Group operates radio stations in fifteen different markets throughout the United States. David Stephens is the owner of SMG. In 2008, SMG purchased radio stations in Massena and Watertown, New York. At times material to this case, NABET–CWA represented certain employees at four of SMG's radio stations in Watertown and one of SMG's radio stations in Massena. In Watertown, the Union represents all broadcast technicians or engineers and all staff announcers, including announcer-operators. In Massena, the Union represents all announcer-operators and technician-announcers. These job titles include the on-air personalities at the radio stations. The Union has represented these employees for decades. It has had separate, long-standing collective-bargaining agreements for each physical location, which are not identical. The Union and SMG negotiated successor contracts for Massena and Watertown in both 2012 and 2015. The most recent contracts ran from May 1, 2015 until April 30, 2018.[4] Before 2018, SMG and the Union conducted separate negotiations for Massena and Watertown. The companies utilized supervisory staff as bargaining representatives.

The prior Watertown contract contained a variety of job, pay, and work hour protections for unit employees. First and foremost, SMG Watertown was prohibited from laying off any employees for the first year of the agreement. Regarding wages, the company was required to pay an employee a minimum of 3 hours of pay on a day the employee was scheduled to work. When unit employees were called back to duty after their regular shifts ended or on a day off, they received a minimum of 4-hours pay. If employees worked a remote broadcast for a client, SMG Watertown was required to pay the broadcast fee when the client failed to pay it after 30 days. The company also was required to post employees' work schedules 2 weeks in advance. Finally, an employee who was hospitalized during a scheduled vacation could reschedule it.

#### *A. Communication Between the Parties Prior to Bargaining*

Via letters dated February 26, the Union notified Glenn Curry, then the general manager for both the Watertown and Massena stations, of its intent to reopen and negotiate changes to each of the expiring contracts. On May 2, Bill Murray, a staff representative for the Union, emailed the existing contracts and the Union's proposed changes to Michael King, an attorney who has served as SMG's outside general counsel for over a decade. Stephens asked King, rather than supervisory staff, to handle the successor contract negotiations this time around. Among the Union's proposals for Watertown were wage increases of 5 percent annually; adding three paid holidays and a vacation day for each year worked over 15; a 3-percent employer match on employees' 401(k) contributions; and a ban on requiring employees to use their personal cell phones for any work reason. For Massena, the Union proposed the same 5-percent annual wage increases, as well as an increase in pay for remote broadcasts and in news preparation pay. The Union proposed 3-year terms for both contracts. The Union's wage increase proposals were designed to ensure compliance with recent changes to the New York state minimum wage law, presuming that law actually applied to unit employees. After receiving the union's proposals, King told Murray he had reviewed the expired Watertown agreement and noted it had many areas where language needed to be cleaned up. He also said he would redline the expired contract when providing the company's counterproposals.[5]

From May 18 to June 6, King and Murray exchanged multiple emails regarding when King would provide the initial responses to the Union's May 2 proposals. On June 4, Murray complained to King about not having received counterproposals. King responded the same day, noting he had discovered there were differences in the Watertown and Massena contracts. King told Murray he was going to work from the Watertown contract, because it appeared to be the more recently updated one. He also told Murray he hoped to submit a response that week. Murray replied that the Watertown and Massena contracts "had always been separate agreements." He also said that, in light of the contracts already having expired, the parties might need to book dates to negotiate in person in Watertown and Massena.[6]

On June 7, King sent Murray a redlined version of the Watertown contract containing his proposed changes. In a cover letter, King wrote that it was "the Company's desire to use these contract terms as a baseline agreement for both Watertown and Massena" and that its proposed wage increase was the same for both locations. He also wrote that he would presume the language agreed upon for the Watertown contract would apply in Massena, unless Murray advised him that the Massena contract required different language. Among the changes sought by King in his redline were:

- deleting the union security provision;
- deleting the 1-year layoff protection and adding language permitting layoffs for "a valid reason to be determined by the Company in good faith," instead of seniority;
- reducing the pay for call backs from 4 hours to time worked plus a half hour of travel time;
- deleting the remote broadcast pay and minimum pay guarantees;
- deleting the requirement that employees be paid overtime for work over 8 hours in one workday;
- reducing the work schedule advance posting requirement from 2 weeks to 2 days;
- deleting an employee's ability to reschedule a vacation if it was disrupted by a hospitalized illness;
- allowing the company to use an automated "on-air" employee or remote talent when a full-time on-air employee was absent, instead of the existing requirement that a part-time unit employee fill the absence; and
- adding the following exception to the list of announcer-

*Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

[4] All dates hereinafter are in 2018, unless otherwise specified.

[5] Tr. 560; Jt. Exh. 3, CP Exhs. 1, 2.

[6] Jt. Exh. 4.

> operator work which could be performed by nonunit employees: "[u]pon a temporary need or exigent circumstance arising, any necessary job function to allow the station to function or provide on air material and talent."

With respect to the union's initial proposals, King offered wage increases of 0.5 percent in the first year of the contract, 1.5 percent in the second and 1 percent in the third, not 5-percent annually as sought by the Union. King made no counterproposal concerning holidays, vacation accrual, and a 401(k) match, leaving the benefits and contract language the same as in the expired contract. King also did not submit a counterproposal on banning employees from having to use their personal cell phones for work.[7]

Murray responded that same day, expressing surprise at the scope of King's proposed changes. Murray explained that, when he previously spoke to Stephens about opening the contract, all Stephens told him was that SMG needed to add duties for new equipment, a simple and limited issue. He told King that, based on the scope of the counterproposals, Murray was turning over the union's bargaining responsibilities to his colleague, Ron Gabalski. (Murray was nearing his retirement date at the time.) He also said that the changes being proposed were not simple ones and would require face-to-face bargaining. He asked King to send Gabalski dates for negotiations in Watertown and Massena. On wages, Murray stated that the company's proposal would have starting rates and steps which would not comply with New York state's minimum wage law. He also noted that the language on remote broadcasts had been settled two contracts ago, because clients were not paying their bills for months on end. As to only receiving a redlined proposal of the Watertown contract, Murray stated there were two contracts and combining them would require time and face-to-face bargaining. Finally, Murray said he saw no response to the other proposals made by the Union.[8]

King responded the next day, June 8. He reminded Murray of King's proposal in his June 7 cover letter to use the Watertown contract as the base for both locations. He also told Murray there was nothing so complicated in King's proposals which would prevent them from beginning discussions. King wanted to get some of the language cleanup completed prior to Gabalski taking over, because Stephens wanted to get a contract done as swiftly as possible. In Murray's reply, he reiterated that the changes sought by the company required face-to-face bargaining. He also told King the Union may find merging the two contracts to be acceptable in the end, but that it would require time and comparison. He added that he believed that subject was permissive.[9]

On June 19, Gabalski emailed King and identified what he believed were the most serious changes King proposed (listed in the bullet points above) which required face-to-face bargaining.[10] He also identified King's desire to use the Watertown contract as the Massena contract as a serious change . Gabalski later spoke to King, who asked Gabalski to first negotiate the small stuff over the phone and email so King could save his client money from the travel expenses associated with face-to-face bargaining. Gabalski refused to do so. King also wanted a full response to his redline proposal before meeting face-to-face, which Gabalski also refused. Gabalski told him that, if the company's serious change proposals were on the table, they needed to sit down in person with the entire local bargaining team for the Union. Ultimately, King and Gabalski agreed to negotiate in person in Watertown on August 15 and 16, and hold August 17 open if needed. Their original plan was to conduct bargaining for Watertown on the 15th and negotiate for Massena on the 16th.[11]

### *B. The Parties' Bargaining from August 15 to 17*

Prior to the start of negotiations, Stephens advised King he wanted to take advantage of enhanced "voice tracking" technology now available for radio broadcasting. In the past, a radio broadcast had a live disc jockey in a studio, typically working a 4-to-6-hour shift playing music and speaking in between songs or during commercial breaks. In contrast, voice tracking is a computer program which permits a disc jockey to pre-record on-air speaking parts and commercials, as well as preprogram the music that is going to be played. An on-air program that has been voice tracked sounds like it is live when heard over the radio. In actuality, the computer automatically plays a prerecorded program, without the need for any live disc jockey in the studio. Stephens felt the Watertown and Massena stations were producing radio programs in a 1980's manner and needed to modernize to the 2018 industry standard. However, producing a radio show using voice tracking takes significantly less time than the total hours of the live on-air broadcast it replaces. In addition, radio stations can employ disc jockeys located in any geographic location outside of where the station broadcasts. Thus, adopting voice tracking in Watertown and Massena would mean some degree of less unit work for on-air employees. To address this in negotiations, Stephens wanted to create higher-paying production jobs for unit employees to pursue, where they would produce new content using online social media platforms.[12]

The parties met to negotiate as scheduled on August 15 at 9 am in Watertown. The union's bargaining team was made up of Gabalski and three-unit employees who also served as union officials. The three were Diane Chase, the president of NABET–CWA Local 24; Allen Waltz, a union steward; and Ashlee Tracey, also a union steward. SMG's negotiators were King and Penny Woolf, the business manager for SMG who was responsible for the Watertown and Massena markets. King and Gabalski were the main speakers during negotiations. At the time of the first session, Gabalski, a non-attorney, had been a staff representative for the Union for just under 1 year and had attended a 2-week training session the prior month. King had been a practicing attorney for 36 years, but had negotiated only several collective-bargaining agreements during that time

[7] Jt. Exh. 5.
[8] Jt. Exh. 6; Tr. 313–314.
[9] Jt. Exh. 6; Tr. 314–315.
[10] The transcript at p. 54, ln. 24 erroneously states Gabalski took over the bargaining responsibilities for SMG in June 2015. It is corrected to read June 2018.
[11] Jt. Exhs. 7–9; Tr. 59–60.
[12] Tr. 326–328, 533–536.

period.[13]

At the start of bargaining that day, King shared Stephens' business modernization plan with the union representatives. He told them the Watertown and Massena stations were utilizing an inefficient business model which was way behind the curve of the current radio marketplace. King noted new technology was available which would make the station much more efficient and enable it to put the best talent on the air. He said SMG wished to move to voice tracking and explained how it worked. He told them it was a good time for SMG to streamline or restructure what they were doing and it was the company's desire to address that in negotiations. He said SMG needed some flexibility regarding the layoffs provision. King then advised the union's team that utilizing voice tracking might result in some initial layoffs or changes to job responsibilities, but the company ultimately hoped to create new, higher paying jobs and end up with no net job loss. He added that, if the two sides worked together on it, the results could be good for both.[14]

For the bulk of the remaining morning hours, the parties reviewed and discussed each of the company's proposals in King's June 7 redlined Watertown contract. Most of the conversation focused on proposals which would allow SMG Watertown to implement voice tracking and which the Union was concerned would reduce their work jurisdiction. The first proposal altered the contract's preamble so that the description of the bargaining unit included employees "at the physical location above specified" or Watertown. The second proposal gave the company the ability to use voice tracking, rather than part-time unit employees, to fill shifts of absent unit employees. The third proposal was the deletion of the union security clause, the intent of which was to ensure that any individuals who were voice tracking from a different geographic location would not be required to join the union.[15] The final proposal was the elimination of the 1-year layoff protection and of using seniority to determine who would be laid off. In explaining these proposals at the table, King reiterated that the stations were operating in an old-fashioned way and needed to gain additional flexibility in the areas covered by the provisions. He also made these proposals, in part, because the company wanted to utilize on-air talent from outside of Watertown who would be excluded from the bargaining unit. Across the table, Gabalski viewed union security and layoffs by seniority as two of the backbones of unionism. Moreover, he thought King's proposed language that a layoff could be implemented with "a valid business reason to be determined by the company in good faith" essentially gave SMG the unilateral right to do so.[16]

The parties also talked about issues not contained in King's contract redline. Woolf raised the prospect of the company only collecting union dues from unit members when it could be verified that the work they were doing was covered by the contract. Gabalski disagreed, explaining that, even if unit employees were doing nonunit work, the Union still represented them during that time and they remained dues-paying members. Woolf also raised an issue over the split of premium costs for health insurance. The expired contract said that SMG Watertown would pay 50 percent of the premium for whatever plan the employee chose. Woolf claimed the actual practice and what the Union agreed to was for the company to pay 50 percent of the lowest cost plan available. She wanted the contract language to reflect the practice. Finally, the parties discussed including definitions of full-time and part-time employees, as well as of workday and work week, in the contract. Thereafter, the Union caucused to review the company's proposals and develop counterproposals.[17]

At 4:41 p.m. on August 15, the Union provided King with a list of 50 proposed changes it had identified in the redlined Watertown contract and the Union's response to each proposal. The Union rejected and did not counter the company's proposals to delete the union security clause; delete the 1-year layoff protection and eliminate the use of seniority to determine layoff order; delete the requirement that the employer pay the remote fee if a client failed to do so within 30 days; and delete the provision allowing employees to reschedule their vacations when interrupted by a hospitalized illness. The Union also offered several counterproposals. As to the preamble language, the Union proposed the bargaining unit would include unit employees at the Watertown location "or any future locations." Regarding schedule notification, the Union countered that the time be reduced from 2 weeks to 1 week, instead of the 2 days King had proposed. Finally, the Union offered tentative agreements on a number of peripheral matters. They included agreeing to a contract start date of May 1; language giving the company the right to use nonunion workers to provide programming during a strike; updating the military leave provision to reflect the title of the current federal law governing such leave; and changing the name of the union's staff representative. Finally, the Union did not respond to several of the proposals, citing the need for a comprehensive rework of the hours of work definitions.[18]

The two sides then discussed the union's counterproposals. On union security, King stated the clause would restrict the

[13] Tr. 60–61, 136–137, 428–429.

[14] Tr. 64, 325–328; 463–465. King's testimony was somewhat inconsistent between direct and cross examination concerning whether he told the union's bargaining team that layoffs would occur from the implementation of voice tracking. On this question, I found his testimony on cross examination to be more specific and plausible. Thus, I base my findings of fact on that testimony. Gabalski also acknowledged that King explained the company's need to modernize when they were discussing layoffs. However, I reject SMG Watertown's contention that King also told the union's bargaining team that SMG intended to implement voice tracking for all radio shows except the morning drives at both locations, once it purchased the necessary equipment. The testimony cited for that proposition is insufficient to establish that fact. (Tr. 64, 330–331.) King was aware of the company's intention, but did not communicate it to the Union at the start of negotiations.

[15] Tr. 434–438. I credit King's explanation that his intent in striking the union security clause was to ensure that, if the company utilized any on-air personalities from different geographic locations through voice tracking, those individuals would not be required to join the Union. King's demeanor was assured and decisive when providing this testimony and his explanation is consistent with King's preamble proposal, which sought to clarify that the contract applied to the Watertown "physical location."

[16] Tr. 61–64.

[17] Tr. 64–65.

[18] GC Exh. 7.

company's ability to hire, retain, or discharge employees, without regard to their union membership. Woolf said the contract told the company what it could and could not do, but it needed the flexibility to retain staff it wanted and get rid of staff it did not. King again discussed changes to the industry and the need for SMG to expand employees' job duties and get them into social media. They also discussed at length the issue of employees being able to reschedule vacation time during hospitalization. Just prior to the session ending, Gabalski emailed King an electronic copy of the union's counterproposals. He also noted in the text other subjects which the parties discussed during bargaining that day which were not included in the union's proposals. Those subjects were dues checkoff; hours of work definitions for full- and part-time employees, work week, and workday; and personality endorsements. He also indicated that the company's bargaining team was going to work on the language regarding health insurance premiums and social media duties. The bargaining session ended at around 6 p.m. that day.[19]

The parties resumed bargaining on August 16 at 10:30 a.m. All of the same people attended, except that David Romigh, the union steward for SMG Massena, joined the group in the afternoon. The Union hoped to begin bargaining for the Massena contract that day. The session started off with King submitting counterproposals to the union's proposals from the prior afternoon. The company proposed modified language for defining bargaining unit employees as "employees employed at the physical location to be identified in the agreement or any other location within the immediate geographical area to which the Company may move its operations of the radio station identified in the agreement." King refused to modify the proposals on layoffs, the deletion of the union security clause, and the deletion of the requirement that employees be paid overtime after 8 hours in a workday. King did modify his proposal on remote broadcast pay, agreeing to retain the existing provision but changing the time requirement at which the company would assume the client's payment obligation from 30 to 90 days. He also proposed modified language regarding rescheduling an employee's vacation time due to hospitalized illness, stating the company would make reasonable efforts to do so if the employee provided 24-hour notice and proof of the hospitalization. The company added language regarding dues checkoff to reflect its previously stated desire to limit dues collection when unit employees were performing nonunit work. It also added language to limit its health insurance premium cost contribution to 50 percent of the lowest cost plan.[20]

For the remainder of the day, the parties exchanged and reviewed numerous proposals. They spent a substantial amount of time discussing the Union's proposed definitions of hours of work terms and the company's response. The main issue being addressed there was a concern that the definitions for full- and part-time employees would lead to confusion over which existing unit employees would continue to receive full benefits. The Union continued to reject King's proposal to allow SMG Watertown to implement layoffs for a valid business reason in good faith and to reduce dues collection by excluding nonunit worktime. The parties did not discuss layoffs, despite King stating multiple times that the company wished to do so. The session again ended around 6 p.m.[21]

At the end of bargaining on August 16, Gabalski described eight significant, substantive issues that were still open: definition of unit employees; union security; layoffs; unit work jurisdiction; health insurance premiums; illness during vacation; wages; and social media. Gabalski told King he was going to work on a big picture proposal that evening to address these open issues and try to get the parties closer to a complete agreement. He told King he needed to get the proposal cleared, but promised he would have it for him the next morning.[22]

Bargaining was scheduled to resume at 9 a.m. on August 17. Gabalski had written up his big-picture proposal the prior evening, but union steward Waltz had to work at the start of the morning. Gabalski told King he wanted to review the proposal with the entire union bargaining team, so they had to wait for Waltz. In the interim, Gabalski asked King for responses to the union's original May 2 proposals. The parties discussed wages, specifically whether the existing or proposed wages complied with the New York state minimum wage law. Neither side had determined whether unit employees were exempt from that law. King also told Gabalski he was not interested in adding more holidays, but might trade 1 day for another. Waltz arrived sometime after 10 a.m. and the Union caucused. The discussion took some time, because the team was not comfortable with Gabalski's draft and wanted to make changes to it. When they returned to the bargaining table, Gabalski told King the union's big picture proposal was not ready and he would have to present it at their next bargaining session. King responded that he wanted the proposal before scheduling another bargaining session. Gabalski eventually agreed to email King the proposal by 5 p.m. on Monday, August 20. The discussions then ceased, because the union representatives had to leave at 1 p.m.[23]

### *C. The Conversations Between Curry and On-Air Personality Frank Laverghetta*

While negotiations were taking place on August 16, General Manager Curry spoke with unit employee Frank Laverghetta, who had been employed by SMG Watertown as an on-air personality since 2011. Curry told Laverghetta that negotiations were not going well. He asked Laverghetta if he would be someone who would cross a picket line if a strike occurred. Laverghetta did not respond. The next day at the end of his shift, Laverghetta went to tell Curry he was leaving for vacation. Curry again brought up the negotiations, telling Laverghetta they were heated. Curry then said he told Stephens there were two people Curry knew of who would cross a picket line and

[19] Tr. 66–72; Jt. Exh. 11.

[20] Jt. Exh. 12.

[21] Tr. 76–83, 339–340; Jt. Exhs. 13–15, 17, GC Exh. 8.

[22] Tr. 84, 349. I credit King's uncontroverted testimony that Gabalski promised to get him the big picture proposal the next morning and needed to get it cleared. The record evidence does not establish from whom Gabalski would be seeking clearance. However, Gabalski often said in negotiations that he needed to check with Washington on contract proposals and their final language. (Tr. 136–137, 351.) The Union's attorney works from Washington, DC.

[23] Tr. 85–90, 146–147, 350–355; Jt. Exh. 18.

Laverghetta was one of them.[24]

*D. King Declares Impasse*

On August 20 at around 5:00 p.m., Gabalski emailed King the union's big-picture proposal. He told King it was a response to the major items for which King was waiting. Gabalski said his intent was to "resolve or clarify some of the layoff language in areas where the company was looking for relief." He also noted the Union was offering some flexibility in the unit work exceptions area which the company had sought. However, Gabalski also said the added flexibility the Union was offering was "not meant as a way to reduce the bargaining unit." Gabalski then listed several items where he was expecting responses from King. These included the unit employee definition, social media duties, and finalized language on health insurance premiums.[25]

The union's big-picture proposal was just over two pages long, with most of the content devoted to the layoffs provision. First, in response to the company's proposal to delete the unit employees' 1-year layoff protection, the Union proposed extending the protection to the entire term of the agreement. In exchange, the Union agreed to the company's proposal in the work jurisdiction article which would allow SMG Watertown to use nonunion personnel to perform, "[u]pon a temporary need or exigent circumstances arising, any necessary job function to allow the station to function or provide on air material or talent." The Union then added language stating the one work jurisdiction exception "shall not be used to reduce the size of the bargaining unit." For hours of work and overtime, the Union agreed to the company's proposal that it be permitted to fill the shifts of absent on-air employees with an automated employee or remote talent. For minimum pay, the Union proposed that unit employees not be involuntarily scheduled for a shift less than 3 hours. The Union made its offers contingent on King withdrawing the proposed deletion of the union security clause. Gabalski felt the Union had made "huge concessions" allowing the company to use remote talent, automation, and nonunit personnel to perform unit work.[26]

On August 22, King sent Gabalski his response. King asserted the Union had not made a big-picture proposal as it had promised to do. He accused the Union of backing away from its commitment to join the company in its effort to modernize and remain competitive in the radio market. King went on to say that, while the parties made substantial progress on many issues with both sides compromising, they remained far apart on the major items which the Union said it would address in its proposal. He then listed and addressed numerous disputed provisions, most of which dealt with layoffs. King noted the Union's expansion of the layoff protection from 1 year to the term of the agreement. King contended the proposal moved the Union further away from the existing contract and the company's initial proposal. He stated that the increased layoff protection was incongruent with the company's desire to employ people based on merit, not seniority. He rejected the union's proposal to restrict the jurisdiction exception from being used to lay off unit employees. King also said the Union had not responded to the company's proposals on union security, call back pay, limiting overtime to hours worked over 40 in a week, and remote broadcast pay. King otherwise rejected the Union's hours of work and overtime proposals. Finally, King noted the parties had tabled discussions on wages, vacations, and talent fees to address the layoff and jurisdiction issues. Near the end of his letter, King wrote:

> Given the significant differences that still exist between the Company and the Union with regard to the proposals above that were addressed, and those that were not addressed, if the Union's position is firm it appears as though we are at an impasse with regard to these substantive provisions and in our attempts to reach an agreement moving forward.

King concluded by saying that, if the Union had some additional proposals it wanted to discuss or if further conversation would be of some assistance, he was available to talk.[27]

On August 23, Gabalski responded with a letter of his own. He stated the parties "have made good progress during our time together, which has been very short. We are miles away from impasse, and the NABET team remains confident we can continue to make progress." Gabalski asked King to let him know when they could resume bargaining face-to-face. Gabalski was shocked at King's impasse declaration. He believed the parties still had multiple open issues where room for movement existed and knew the company had not yet responded to all of the union's proposals.[28]

King replied the next day. While conceding the parties had made significant progress on many peripheral issues, King contended that, when they addressed the issues upon which they were at impasse, the Union simply rejected the company's proposals without offering a counterproposal. King asserted the union's big-picture proposal was a continuation of that approach, because it rejected the company's proposal without providing a counterproposal addressing the company's needs. King concluded by saying he was willing to continue negotiations, but "would require the Union to provide some indication we still have something to talk about." King indicated that requirement could be met by submitting "something akin to the big-picture proposal which addresses the Company's needs to restructure its work force and to remain competitive in the marketplace that I was promised on Thursday afternoon and Friday morning last week." Gabalski responded the same day, saying only that he looked forward to resuming the bargaining process and asking for dates that King was available to meet and exchange additional proposals.[29]

*E. SMG Watertown Implements Layoffs and Other Changes to Working Conditions*

At the time of the contract negotiations in August 2018, SMG

[24] I credit Laverghetta's testimony concerning what Curry said to him on August 16 and 17 over Curry's denial that he ever asked Laverghetta to cross a picket line. (Tr. 281–283, 630–633.) When testifying about what occurred, Laverghetta appeared certain and matter-of-fact. In contrast, Curry's demeanor appeared unreliable and his account of their conversation was inconsistent and implausible.

[25] Jt. Exh. 19.
[26] Tr. 91–92, 152.
[27] Jt. Exh. 20.
[28] Jt. Exh. 21; Tr.94.
[29] Jt. Exhs. 22, 23.

Watertown employed bargaining unit members at four radio stations in Watertown. The stations were "Froggy 97" (WFRY-FM), "Z93" (WCIZ-FM), 790WTNY (WTNY-AM), and 1410AM Fox Sports Radio (WNER-AM). As previously noted, Curry was the general manager of those stations. Edward Kreutter was the program director, a supervisory position, for two of the stations. Kreutter also worked as an on-air personality known as "Jay Donovan," who hosted the Z93 morning drive.[30] Stanley Soboleski was the program director of Froggy 97. Soboleski also was an on-air personality under the moniker "James Pond," hosting the Froggy 97 morning drive.

During the same timeframe, SMG Watertown also employed Chase, Laverghetta, Michael Stoffel ("Web Foot"), and Tracey as on-air personalities. Each had a regular, on-air shift every weekday. The part-time on-air personalities included Holly Gaskin ("Cricket"), who hosted a 6 a.m. to noon shift every Saturday on Froggy 97; Brian Best ("Bullfrog"), who hosted a 4-hour shift on Z93 every other Saturday and also worked part-time news, the latter of which was not bargaining unit work; and Jeffrey Shannon, who hosted a 5:30 a.m. to 10 a.m. shift every Saturday morning on Z93. Shannon also preproduced a 2-hour show called Z93 Wind, which ran once on the weekends. Stoffel was employed by SMG Watertown for 30 years, Shannon for 22 years, Chase for more than 20 years, and Gaskin for 17 years.

On August 20, the same day Gabalski sent King the Union's counterproposal on layoffs and jurisdiction, Tracey submitted a 2-week notice of her intent to resign from SMG Watertown effective August 31. Given her resignation and King's subsequent notification to Stephens that he thought the parties were at impasse, Stephens decided to immediately implement voice tracking for mid-day and afternoon drives, while remaining live in the mornings.[31]

On August 23, Curry, the general manager, and Woolf, the business manager, met with Chase and Stoffel. Curry said the company was restructuring and they were laid off. After Chase asked why, Curry said the company was going to voice track all the on-air shifts at its stations, except for mornings. Woolf then told them other positions would be available going forward and they were welcome to apply. Curry and Woolf then called Laverghetta, who was on vacation, and told him he was laid off. They said they strongly suggested he apply for jobs that might be available in the future. Curry also met with Tracey and said he was accepting her resignation immediately. SMG Watertown paid Chase, Laverghetta, and Stoffel 2 weeks of severance pay and their salaries through August 24. Tracey received her salary and benefits through her originally planned resignation date of August 31.[32]

That same day, Kreutter called Shannon and told him his weekly Saturday morning shift was eliminated, but added they still wanted him to do his Z93 Wind show and were thinking of expanding it. Subsequently, Curry asked Shannon to expand the Z93 Wind show to 2 days and Shannon agreed. Shannon's work hours remained roughly the same as a result of the show's expansion and the elimination of his regular broadcast. In addition, Soboleski advised Best and Gaskin that their weekend shows were eliminated. He told Gaskin it was due to corporate in Tulsa making some cuts and automating everything except the weekday morning shows.[33]

Neither Curry, nor anyone else from SMG Watertown, advised the Union of these actions before implementing them.[34]

Following the layoffs and shift eliminations, SMG Watertown made a number of additional personnel moves. Almost immediately after Stoffel was laid off, Stephens and Curry offered and Stoffel accepted a newly created, supervisory position of "production and social media director." Stoffel continues to host his prior radio shift, but through voice tracking. His show also was added to another station. Stoffel's remaining worktime is spent on production. He earns more in his new position than he did prior to being laid off. On August 28, Curry signed off on an "Agreement for Voice Tracking/Production Services" between SMG Watertown and Annette Miller, who lives in Cincinnati. The contract, which Miller executed on September 5, calls for her to voice track the midday shift at Froggy 97 and the afternoon drive at Z93, as well as voice commercials. Those shifts previously were covered by two of the laid off, bargaining unit employees. Miller's pay is $866.66 per month. In contrast, Chase made roughly $2,500 per month and Laverghetta the equivalent of about $1,800 per month for each of their live, on-air midday shifts. In October, SMG Watertown rehired Best in the supervisory position of news director for all four radio stations. Best resumed performing his Saturday afternoon show on Z93, but through voice tracking. Although he is reemployed, Best's overall work hours decreased.[35]

### *F. The Union's Information Requests Concerning the Layoffs and Other Changes*

On August 24, Chase advised Gabalski of her layoff. That same day, the Union filed an unfair labor practice charge against SMG Watertown with the Board. The charge alleged SMG Watertown violated Section 8(a)(3) by discharging three full-time employees (Chase, Laverghetta, and Stoffel). It also alleged the

[30] For at least the last 20 years, SMG Watertown's program directors have been supervisory positions, but some of them have performed on-air, bargaining unit work. (Tr. 233.)

[31] Tr. 544–548. Stephens determined that it would be unfair to hire a full-time employee to fill Tracey's broadcast, because he knew his objective was to transition her shift to voice tracking. He also chose not to fill Tracey's position with an existing part-time employee, as the expired contract required, because he felt the part-time employees did not have the skill level of full-time employees. (Tr. 541–542.) Stephens was able to immediately transition to voice tracking utilizing the existing technology at the Watertown stations, because he had a contingency plan already in place in the event that the unit on-air talent went on strike during contract negotiations. (Tr. 363, 412–413.)

[32] Tr. 23–27, 216–219, 284–287, 693–695; GC Exhs. 2, 3, 26.

[33] Tr. 27–31, 35–37, 273–275, 292–295, 576–578, 594–596; GC Exh. 4.

[34] Tr. 26–27, 29, 30–31, 45–48, 107–109.

[35] Tr. 27, 31–32, 36–37, 536, 548–550, 567, 570–571, 578–579, 696; CP Exh. 3, GC Exhs. 5, 6. On August 24, Soboleski asked Gaskin if she was interested in available part-time work going forward, specifically continuing her on-air shift on Saturday using voice tracking. However, Gaskin was not subsequently rehired. (Tr. 273–276, 551–552, 586–589; R. Exh. 5.) Laverghetta also sent his resume in following his layoff, but was not rehired. (Tr. 288, 589–591.)

company violated Section 8(a)(5) by laying off full-time and part-time bargaining unit employees; unilaterally changing the layoff and seniority provisions in the collective-bargaining agreement; and by engaging in surface bargaining.[36]

The next day, Chase submitted a request to Curry for the following information: (1) a seniority list for all unit employees as of August 22; (2) the personnel files of all bargaining unit members as of the same date; (3) all hours worked by part-time employees for the previous 18 months; and (4) accrued vacation, holiday, and other paid leave time, including how and when such leave was used, for all bargaining unit members as of August 22. In the request, Chase wrote the Union needed the information in order to "administer the collective bargaining agreement and represent bargaining unit members." On August 26, Gabalski sent King a second information request seeking (1) the written layoff notices given to bargaining unit employees the prior week; and (2) written notices of any other type given to bargaining unit employees the prior week.[37]

King responded to Gabalski regarding Chase's information request the next day. He asserted the company already had provided the Union with a seniority list for bargaining unit members. Regarding the other requests, King told Gabalski he did not understand the Union's asserted justification for making the request. King said the information was not related to the issues upon which the parties were at impasse. Gabalski responded the next day and told King the information was related to the layoffs and to evaluate potential grievances.[38]

On September 19, King asked Gabalski if the two could speak on the phone about the information requests. Gabalski responded such a call was unnecessary, because all of the requested information was about bargaining unit members and thus presumptively relevant. On October 11, Gabalski told King he could call the union's attorney, Judiann Chartier, for an explanation of the information requests.[39]

### *G. The Parties' Final Bargaining Session on October 22 and Its Aftermath*

From August 28 to October 12, King and Gabalski exchanged numerous emails where they continued to argue about whether the parties had reached impasse and when to resume negotiations. In a letter dated September 20, King offered his most detailed argument in this regard. He asserted the Union's layoff proposal did not address SMG Watertown's repeated assertion that it was no longer willing to determine layoffs or personnel decisions on seniority, but wanted to base it on talent. He also contended that he repeatedly had expressed in bargaining that the company needed to automate programming and layoffs would occur. He said the Union rejected the company's proposal on layoffs twice, before submitting its package proposal which did not move the parties closer. On three occasions in these back-and-forth communications, Gabalski asked King for additional bargaining dates to continue bargaining the Watertown contract. On September 10 and 21, Gabalski also stated he was asking for dates to begin bargaining for WMSA in Massena. At first, King resisted. He again said he would not continue negotiations until the Union broke the impasse by providing a proposal with movement on layoffs. King wanted the Union to guarantee the company the ability to use a merit-based employment decision process. Although King continued to insist on receiving a revised proposal from the Union, he finally agreed to resume bargaining on October 22. King did not respond regarding Massena bargaining.[40]

On that date, the parties met up at approximately 4 p.m. in Watertown. The Union was represented by the same individuals, except that Laverghetta replaced Romigh. At the start, King asked where Romigh was and who would be bargaining for Massena. Gabalski said they had authority to bargain for both units. On the sign-in sheet for the parties' representatives that day, King insisted on adding "Massena" to the description "Negotiations for Stephens Media Watertown and NABET-CWA" at the top of the page. He did so, because he was aware the Union had filed an additional unfair labor practice charge alleging SMG had refused to bargain over the Massena contract. The initial discussion addressed King's impasse claim. Gabalski reiterated his view that they were nowhere near impasse. He said that, because King insisted on getting the union's big-picture proposal immediately via email instead of face-to-face, King received the proposal without any context or explanation. Gabalski explained the proposal was the union's attempt to balance concessions given on work jurisdiction with layoff protections.[41]

After a caucus, the Union provided the company with a written revised proposal on layoffs. In it, the Union agreed to the deletion of the 1-year protection from layoffs for bargaining unit employees. It also agreed to striking a requirement in the existing contract that SMG Watertown maintain at least one full-time employee, if it employed part-time employees. The concessions were contingent upon the company withdrawing its proposal to delete the union security clause. The proposal retained seniority as the criterion upon which layoffs would be implemented. The company representatives caucused and returned with King's handwritten counterproposals on the same document. King wrote in language which would allow the company to lay off employees for "business reasons" without having to utilize seniority. The group then discussed what might cause a layoff other than a business reason, with Gabalski remaining concerned the exception was too broad. Near the end of the session approaching midnight, Gabalski asked King if he would be willing to modify his proposed language to give the Union the ability to challenge whether the company had a legitimate business reason for a layoff. King said he was willing and offered to type up a revised proposal with that option, once Gabalski cleared the idea with his legal counsel. The plan was to have Gabalski review King's typed proposal and respond with either an agreement or proposed changes to the language. When King and Woolf exited the session, they met up with Stephens and told him they thought they had an agreement on the layoff issue.[42]

[36] GC Exh. 1(a).
[37] Jt. Exhs. 24, 25.
[38] Jt. Exh. 26.
[39] Jt. Exhs. 27, 29, 32.
[40] Jt. Exhs. 26, 28, 30–33.
[41] Tr. 98–100; Jt. Exh. 10, p. 2.
[42] Tr. 100–102; GC Exh. 11. The General Counsel and the Charging Party contend Gabalski never made the oral proposal to King during the

At the October 22 session, the parties also reached tentative agreements on the health insurance premium language and elimination of the 3-hour minimum call pay. The session ended at midnight.[43]

On November 26, King emailed Gabalski, stating:

> Ron we seem to have gone of the rail somewhere. When we last met for a negotiating session it appeared we were close to resolution on the layoff and seniority provisions upon which we had previously been at impasse. My recollection was you were going to confirm the Union's position and get back to me and I was then going to take a stab at some language. Do you have some time this week or next to discuss where we are and what we need to do to move this process forward?

On November 30, Gabalski responded, telling King his notes indicated that, prior to the next bargaining session, King was going to prepare something on seniority and layoffs for the union bargaining team to review.[44]

On December 21, King sent Gabalski his language draft, which he asserted was the revised company proposal reflecting the "tentative agreement" from their October 22 bargaining session. In the proposal, King struck the language under which layoffs were implemented by seniority. He replaced it with:

> Should it become necessary for the company to lay off any bargaining unit employee(s), the company shall determine which employee(s) shall be laid off. After company determines which employees are to be laid off by company, company shall give union notice of such layoff determination to Union through its representative _____, company shall not implement layoff until the following have been satisfied: 10 days shall have elapsed from the date of notice to Union of the Company's determination of employee(s) to be laid off; and company has provided union with a date and time for union to meet and confer with company to discuss and present alternate proposals to company's layoff determination and company has met and considered union proposal.

King also deleted the union's proposed language adding a work jurisdiction exception. On January 2, 2019, Gabalski acknowledged receipt of King's proposal. Via letter dated February 22, 2019, Gabalski responded, stating he wished to "clarify any misunderstanding" about the parties having reached an agreement on October 22. Gabalski said the parties had discussed on that date that any counterproposals King sent "were intended for review only and would not require a response away from the bargaining table." He added the Union had made clear it was not waiving its right to bargain in person and it would have additional questions about King's proposal when they met again face-to-face. On February 28, King provided available dates to Gabalski for "continuing to bargain with regard to the remaining issues at which the parties currently are at impasse." Thereafter through May 1, 2019, King and Gabalski again bickered back and forth via email over whether the parties had reached a tentative agreement on layoffs on October 22 and when they would meet again for face-to-face bargaining. In July 2019, Gabalski informed King the Union would not meet to bargain unless the company restored the laid-off employees to their jobs and rescinded the unilateral changes it made following the impasse declaration. The Union never received counterproposals from King to its initial contract proposals for SMG Massena, save for the proposed wage increases which would apply at both Watertown and Massena.[45]

### *H. The Remaining Communication Between the Parties*

October 22 session, in which the Union would agree to eliminating layoffs by seniority in exchange for an opportunity to challenge a layoff prior to implementation. I reject this contention and credit King's testimony. (Tr. 373–377, 512–514.) King was detailed and his demeanor convincing when testifying on this subject. Woolf corroborated King's account of what occurred in bargaining, while Woolf and Stephens corroborated King's testimony about their discussion with Stephens after the session. (Tr. 545, 696–699, 710–712.) Woolf's testimony was consistent on direct and cross and her demeanor indicative of reliable testimony. In contrast, Gabalski's testimony about the layoff discussion after King made his handwritten counterproposal was abbreviated and unconvincing. (Tr. 102.) Chase testified about her role in bargaining, but was not questioned about what occurred at the October 22 session. (Tr. 213–216.) After King, Woolf, and Stephens testified, Gabalski was not recalled in rebuttal to address their contention that the Union had made this proposal. Nonetheless, in making this credibility determination, I do not find that the parties reached a tentative agreement, as King later claimed. Rather, I find that the Union raised the idea of it being able to challenge whether the company had a legitimate business reason for a layoff and King was amenable to it. I also note, as will be discussed later, that the subsequent written communication between King and Gabalski on this topic supports this conclusion.

In making this credibility determination, I do not rely upon King's bargaining notes of the October 22 bargaining session or his testimony regarding them. (R. Exh. 3 (rejected); Tr. 787–822 (offer of proof.) Prior to the hearing, the General Counsel subpoenaed all bargaining notes from the Respondents from March 1, 2018 to the present relating to bargaining for the SMG Watertown successor contract. The Respondents initially responded to the request by asserting no responsive documents existed. However, at the end of the hearing, the Respondents disclosed that they had found notes King took during the October 22 bargaining session and sought to introduce the notes through testimony from King. In the notes, King wrote: "Union counter need language that provides for pause before implementation to consult." Both the General Counsel and the Charging Party objected, due to the failure to timely disclose the existence of these subpoenaed documents. I rejected the exhibits and any testimony regarding them, but permitted the Respondents to make an offer of proof by questioning King and took the matter under advisement. An administrative law judge has discretion in Board proceedings to impose a variety of sanctions for subpoena noncompliance. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 395–396 (2004). Potential sanctions include precluding a party from introducing into evidence documents it had failed to produce in response to the General Counsel's subpoena. *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1987). I find that sanction appropriate here. The General Counsel's request was clear and the Respondents' review of its case files, whether paper or electronic, should have revealed the existence of the bargaining notes. Based upon King's testimony, I find that the failure to produce the notes was an inadvertent error. However, the prejudice to the General Counsel and the Charging Party of the failure to disclose the documents warrants the sanction.

[43] Tr. 102–104; GC Exh. 10.

[44] R. Exh. 1, pp. 414–415.

[45] GC Exhs. 12 (pp. 1, 7–9), 16 (p. 3), 17 (p. 3), 18 (pp. 2–3), 19 (pp. 3–4), 20 (p. 2); R. Exh. 1 (pp. 431, , 440, 458; Tr. 122, 127–130, 390–395.

*Regarding the Union's Information Requests*

In mid-October, after Gabalski referred King to Chartier to discuss the Union's information requests, King spoke to her. King expressed a concern that turning over employees' personnel files would subject SMG Watertown to a privacy claim under the federal Health Insurance Portability and Accountability Act (HIPAA). King told Chartier he wanted releases from employees before turning over their personnel files. Chartier responded that releases were not required but, if Gabalski and the local were not opposed to providing them, it was fine. King had his staff prepare a release and send it to Gabalski on October 28. Having not received a response, King sent Gabalski a letter dated November 12 inquiring about the releases. Gabalski did not respond.[46]

On December 21, King notified Gabalski that all of the information from Chase's August 25 request, except for the personnel files, was available to the Union through a file sharing service. King explained that he was not turning over the personnel files, because he had not received executed releases from employees. On February 11, 2019, despite not having ever received executed releases, King provided the personnel files to Gabalski. On February 22, 2019, Gabalski responded to King, telling him SMG Watertown still had not provided copies of written notices to employees of schedule changes during the August restructuring. On February 28, 2019, King responded, contending the company already had provided those documents. On March 6, 2019, Gabalski responded, saying that King himself stated in his August 25 email that part-time employees who had their schedules changed received something in writing. He reiterated that the Union had not received those documents. On April 19, 2019, King advised Gabalski that King misunderstood what his client told him regarding what had been given to part-time employees. He said the Union had all of the written documentation that was given to any employees.[47]

## LEGAL ANALYSIS

### *A. Did SMG Watertown Prematurely Declare Impasse?*

The General Counsel's complaint alleges that SMG Watertown prematurely declared impasse on August 22, 2018.

A bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub. nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). To determine whether impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Stein Industries, Inc.*, 365 NLRB No. 31, slip op. at 3 (2017) (quoting *Taft Broadcasting Co.*, supra). Impasse is defined as the point in time in negotiations when the parties are warranted in assuming that further bargaining would be futile. *PRC Recording Co.*, 280 NLRB 615, 635 (1986) (citations omitted). "Both parties must believe they are at the end of their rope." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016) (quoting *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993)). The party claiming impasse, here Respondent SMG Watertown, bears the burden of demonstrating its existence. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 2 (2018).

The majority of the *Taft Broadcasting* factors support the conclusion that SMG Watertown and the Union did not reach a bargaining impasse on August 22. As to bargaining history, the circumstances in 2018 were markedly different from prior contract negotiations. Neither King nor Gabalski had ever bargained a contract for SMG Watertown. It also was the first time they negotiated with each other. When bargaining began, neither individual had a significant amount of experience negotiating collective-bargaining agreements. Although King has worked as an attorney for 36 years, he only bargained several contracts in that timeframe. Gabalski had been a staff representative for the Union for less than a year. In addition, Stephens chose King in part because Stephens intended to implement voice tracking and wanted to secure that ability in negotiations. The modernization plan introduced into bargaining the possibility of unit employees losing work hours or even their jobs. That this subject would be contentious is obvious. By utilizing King to bargain instead of his supervisory staff as had been done previously, Stephens indicated he knew that to be the case. Finally, King's initial proposals sought other major changes in unit employees' working conditions. These included changing the dues-checkoff provision, eliminating the minimum pay guarantees for scheduled shifts and remote broadcasts, and no longer paying overtime after 8 hours in a workday. The representatives' lack of negotiation experience, including with each other, and the substantial contract modifications sought by SMG Watertown weigh against finding impasse.[48] *Stein Industries, Inc.*, supra, slip op. at 4, fn. 9.

Regarding the length of negotiations prior to the impasse declaration, the parties had bargained for only 2-½ days. During the first 2 days, the parties discussed SMG Watertown's proposed changes to several, critical contract provisions, including on layoffs, work jurisdiction, definition of unit employees, union security, dues checkoff, hours of work, health insurance premiums, and rescheduling of vacation time due to illness. The scope and breadth of the changes being sought by SMG Watertown renders it dubious, at best, that the parties could reach impasse in such a limited timeframe. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1064 (2006); *Newcor Bay City Division*, 345 NLRB 1229, 1239 (2005). Moreover, during the abbreviated timeframe, SMG Watertown never provided initial responses to several of the Union's initial May 2 proposals, including holidays and a 401(k) match for unit employees. The parties also did not discuss all of the issues that were in dispute.

[46] Tr. 383–385; R. Exh. 1, pp. 338, 356.

[47] GC Exhs. 12–19.

[48] It is true that, prior to 2018, SMG Watertown and the Union had successfully negotiated successor contracts in 2012 and 2015. In addition, the contract covering the SMG Watertown unit was a longstanding agreement, in effect prior to SMG purchasing the Watertown radio stations in 2008. Although these facts normally would support a finding of impasse, the changed circumstances in 2018 render the prior, stable bargaining relationship irrelevant.

As to the parties' contemporaneous understanding concerning the state of negotiations, the Union immediately disagreed with King's August 22 declaration of impasse. Gabalski told King the very next day that they were "miles away from impasse" and noted the parties' good progress in a very short period of time. He also asked to resume bargaining face-to-face. Thus, this factor likewise does not favor a finding of impasse. *Ead Motors*, supra at 1064.

Regarding the parties' good faith in the negotiations, the bargaining from August 15 to 17 was unremarkable. Prior to meeting, the parties exchanged their initial proposals. During the first 2 days of negotiations, they engaged in the typical practice of discussing one side's proposals, caucusing, and then providing counterproposals. The parties also reached several tentative agreements. Although the TAs were on minor subjects, the Union's demonstrated flexibility and willingness to compromise in an effort to reach agreement nonetheless supports a finding of no impasse having been reached. *Cotter & Co.*, 331 NLRB 787, 787 (2000). On the final day, they broached the subject of wages, discussing whether the New York state minimum wage law applied to unit employees. Nothing suggests the Union was acting in bad faith and was not interested in making progress towards reaching an agreement.

SMG Watertown argues the Union had no intention of ever reaching an agreement which would allow the company to voice track and implement layoffs on a basis other than seniority. It points to the Union's delay in providing the "big picture" counterproposal and to the substance of that proposal once Gabalski finally sent it to King on August 22. I find no merit to this contention. Prior to face-to-face bargaining, all the Union knew from King's initial proposals was that SMG Watertown wanted to delete the 1-year layoff protection and be able to lay off unit employees for a valid reason to be determined by the company in good faith. It was not until their first bargaining session that King explained the company wanted to voice track programming and advised the Union that a possibility of initial layoffs existed. At that point, Gabalski became aware that on-air personalities could lose their jobs as a result of negotiations. Chase and Tracey also were on the bargaining team and, as full-time, on-air personalities, were among the employees whose livelihoods were at risk. With that possibility just revealed, it is understandable that the union bargaining team would need time to develop and agree upon a counterproposal. The delay in providing the counterproposal is not indicative of bad faith.

That being said, King's frustration with the substance of the Union's big-picture proposal was understandable. Although it did offer to permit SMG Watertown to use voice tracking to cover radio programming on a temporary basis, the Union sought to extend unit employees' layoff protection from 1 year to the term of the agreement, likely 3 years, in exchange. The Union also specified that voice tracking could not be used to reduce the size of the bargaining unit. These were not the "huge concessions" Gabalski believed them to be. The big picture proposal put the company further away from being able to voice track its daily broadcasts other than morning drives, as it desired to do. Nonetheless, that reality does not establish the Union was bargaining in bad faith. The Union's proposal did open the door to the company's use of voice tracking. Given the movement by the Union, SMG Watertown was not justified in concluding the negotiations were at impasse simply because the concessions were not more comprehensive or sufficiently generous. *Larsdale, Inc.*, supra at 1319. Moreover, this was the Union's initial counterproposal on layoffs. The Union's decision to take a hard position at the outset of the negotiations does not mean it would refuse to yield later in the process after further bargaining. *Stein Industries*, supra, slip op. at 3–4 fn. 8; *Detroit Newspaper Local 13 v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979). Rather than test the Union's resolve, King instead immediately declared impasse. SMG Watertown also points to Chase's comment during the August negotiations that the Union would never ratify a contract containing a merit-based layoff system.[49] This too does not establish impasse, because "it is commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to obtain agreement." *Cotter & Co.*, supra. Again, the Union had just learned of the company's desire to voice track and potentially layoff on-air personalities, including Chase. That she initially would express dissatisfaction with that proposal is to be expected, but is not a firm indication the Union would not alter its position on layoffs. The Union never said further concessions on layoffs would not be forthcoming. Even if SMG Watertown believed the Union would never agree to merit-based layoffs, its belief does not establish impasse. *Ford Store*, 349 NLRB 116, 121 (2007).[50]

To demonstrate impasse, SMG Watertown relies upon the Board's decision in *H & H Pretzel Co.*, 277 NLRB 1327 (1985). I find that case to be inapposite to this one. In *H & H Pretzel*, the employer notified the union 6 weeks before contract expiration of its intent to convert unit employees into independent contractors. In negotiations, the employer advised the union it was not economically feasible for the company to remain in business under the terms of the existing contract. It also provided data showing diminishing gross sales over a period of years and offered additional financial information if the union wanted it. The union rejected the company's proposal out of hand in bargaining and its members later voted to do the same. The company then submitted an alternative proposal, under which its workers would remain employees but with reduced compensation to allow the company to survive. The union rejected that proposal as well and its employees again voted to do so. In contrast to the employer's proposals, the union sought increases in the wages and benefits of unit employees, without regard for the company's financial problems. In those circumstances, the Board concluded the parties had reached a bargaining impasse. In this case, SMG Watertown did not make its layoff and other proposals because it was in danger of going out of business. In addition, the Union did not reject the layoff proposal out of hand and never submitted the proposal to the unit for a vote. Rather, the Union provided a counterproposal which allowed for voice tracking under certain

[49] Tr. 687–688, 705.

[50] This conclusion is further supported by the fact that, in the subsequent bargaining session on October 22, the Union made a counterproposal with further concessions on the layoff provisions.

temporary circumstances. The Union's conduct is not indicative of impasse.

Accordingly, the good faith of the parties in negotiations indicates that no impasse had been reached as of August 22.

The only *Taft Broadcasting* factor that favors a finding of impasse is the importance of the issues upon which the parties disagreed. Indeed, it would be difficult to think of a more significant issue than the ability for unit employees to be protected from layoffs and remain employed or maintain their full-time work hours. Nonetheless, at the time of the impasse declaration, the parties had not exhausted the possibility of reaching agreement on the implementation of voice tracking and any resulting layoffs. Although the Union's big picture proposal was not the one King wanted, it did open the door to SMG Watertown's use of voice tracking. That movement by the Union demonstrated that the parties had not reached the end of their respective ropes on the subject.

In sum, the totality of the circumstances establishes the parties had not reached impasse on August 22.[51]

### *B. Did SMG Watertown Unilaterally Change Employees' Working Conditions?*

The General Counsel's complaint alleges that SMG Watertown unilaterally changed unit employees' working conditions, despite not having reached a bargaining impasse.

The law is well settled that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Where, as here, parties are engaged in contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. It encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Any unilateral change to employees' terms and conditions of employment without a valid impasse violates Section 8(a)(5). *Larsdale, Inc.*, 310 NLRB at 1318–1319.

The complaint alleges four unlawful unilateral changes arising from SMG Watertown's implementation of voice tracking. The changes include the layoffs of full-time, on-air personalities Chase, Laverghetta, Stoffel, and Tracey; the elimination of the regularly-scheduled weekend on-air shifts of part-time unit employees Best, Gaskin, and Shannon; the reduction in work hours of Best and Gaskin; and the transfer of bargaining unit work to non-bargaining employees. All of these changes involved mandatory subjects of bargaining. See, e.g., *Winchell Co.*, 315 NLRB 526, 530 (1994) (layoffs); *Carpenters Local 1031*, 321 NLRB 30, 31 (1996) (reductions or changes in work hours); *Regal Cinemas*, 334 NLRB 304, 304 (2001) (transfer of bargaining unit work to managers or supervisors, where it has an impact on unit work). Because SMG Watertown and the Union had not reached an impasse in bargaining, the company cannot defend its unilateral changes on that basis. Rather, SMG Watertown bears the burden of establishing that its unilateral changes were in some other way privileged. *Fresno Bee*, 339 NLRB 1214, 1214 (2003).

To do so, SMG Watertown argues that its decision to move from live to voice-tracked programming was not a mandatory subject of bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676–677 (1981). The company contends its decision to eliminate live afternoon and weekend broadcasts through automation constitutes a change in the scope and direction of its business.

In *First National Maintenance*, the Supreme Court examined whether certain managerial decisions affecting terms and conditions of employment might fall outside the realm of mandatory subjects of bargaining under Section 8(d) of the Act. It identified three types of management decisions: (1) those that have "only an indirect and attenuated impact on the employment relationship," such as decisions involving advertising, promotion, product type and design, and financing arrangements; (2) those that "are almost exclusively an aspect of the relationship between employer and employee," such as those related to the order of succession of layoffs and recalls, production quotas, and work rules; and (3) those that have "a direct impact on employment…but [have] as [their] focus only the economic profitability of" the business. Decisions in the first category are not mandatory subjects of bargaining, while decisions in the second category are mandatory subjects. For decisions in the third category, a balancing test applies and bargaining is mandatory only if the benefit, from labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Applying that framework, the Court determined that the employer was not required to bargain over its decision to cancel a contract to provide cleaning and maintenance services to a customer. The employer terminated the contract due to a dispute over the management fee the customer would pay the employer. The Court found the decision fell into category 3 because it was motivated by economic profitability, not labor costs, but resulted in the discharge of 35 employees. Under those circumstances, cancelling the contract was akin to a partial closure of the

[51] In reaching this conclusion, I note SMG Watertown argues in its brief that it reached impasse only on layoffs. However, it evaluated the impasse issue using the *Taft Broadcasting* factors, rather than the legal standard applicable to a single-issue impasse. As a factual matter, King's contemporaneous communication with Gabalski when declaring impasse did not limit its basis to the layoffs dispute. Nonetheless, even if the single-issue standard applied, the result remains the same. The party asserting a single-issue impasse has the burden of proving: (1) a good-faith impasse existed as to a particular issue; (2) the issue was critical in the sense that it was of "overriding importance" in bargaining; and (3) the impasse as to the single issue "led to a breakdown in overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Atlantic Queens Bus Corp.*, 362 NLRB No. 65, slip op. at 1 (2015) (quoting *CalMat Co.*, 331 NLRB 1084, 1097 (2000)). Neither element 1 nor element 3 have been established here. As previously discussed, the parties were not at impasse on layoffs. The parties also made progress on other bargaining subjects during their August sessions, despite never discussing layoffs. Thus, no single-issue impasse occurred.

business and, thus, a change in scope and direction. Furthermore, the employer's interest in running a profitable business outweighed the benefit of subjecting its decision to bargaining. The Court explicitly noted that it was offering no view on whether other types of management decisions, including automation, were mandatory subjects of bargaining, instead saying those decisions are to be considered on their particular facts.

Since *First National Maintenance* was decided, the Board consistently has held that the decision to close or partially close a business constituted a change in scope and direction and is not a mandatory subject of bargaining, where the decision is not motivated by labor costs. See, e.g., *Rigid Pak Corp.*, 366 NLRB No. 137 (2018) (closure of blow-molding manufacturing division and instead purchasing finished product from a vendor); *AG Communication Systems Corp.*, 350 NLRB 168, 172 (2007) (acquisition of another company, closure of the acquired company, and subsequent restructuring which included integration of two bargaining units).

I conclude the *First National Maintenance* framework is not applicable to this case. SMG Watertown did not close a line of business or contract its existing business when it implemented voice tracking. It continued to broadcast on the four Watertown radio stations with the same morning drive hosts it had before voice tracking. Listeners to all broadcasts could not tell the difference between a live and voice-tracked program. The only difference, for some shifts, was the identity of the broadcaster. Furthermore, the work of on-air personalities has not changed at all. They still must talk to the audience between songs and going into commercial breaks. The only job duty changes from voice tracking are the prerecording of the disc jockey's voice, preprogramming of music, and the lack of need for a DJ to be live in studio. None of those changes lie at the core of entrepreneurial control of a business. Rather, SMG Watertown changed its operation by degree, not kind. See *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644–645 (2011) (outsourcing of unit work to subcontractor which utilized more advanced technology and which resulted in layoff of one employee and reassignment of another to supervisory position was not change in scope and direction); *Winchell Co.*, 315 NLRB 526, 526 fn. 2 (1994) (investment in desktop computers which reduced unit work and resulted in layoffs was not change in scope and direction, where company continued to perform all but the initial steps of its production process.)[52]

That *First National Maintenance* is inapplicable to this case is further cemented by examining the actual changes the company made after implementing voice tracking. First, SMG Watertown subcontracted with Miller to produce two on-air broadcasts previously assigned to unit employees. It intends to do the same with all of its non-morning-drive broadcasts. An employer's decision to replace employees in an existing bargaining unit with those from an independent contractor to do the same work under similar conditions of employment is a mandatory subject of bargaining. *Mid-State Ready Mix, A Division Of Torrington Industries*, 307 NLRB 809, 810–811 (1992) (employer's layoff of two unit drivers and replacement of them with a nonunit employee and an independent contractor was a mandatory subject of bargaining); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (employer's decision to subcontract maintenance work due to a desire to reduce labor costs was mandatory subject). A decision to subcontract work of employees, unaccompanied by any substantial commitment of capital or change in the scope of a business, is not one at the core of entrepreneurial control and thus is subject to bargaining.[53] *Torrington Industries*, supra. Second, the company laid off morning-drive host Stoffel from his unit position, then almost immediately rehired him to a newly-created supervisory position. Stoffel continued to perform the same radio broadcast he did as a unit employee, but through voice tracking. As previously noted, the transfer of bargaining unit work to managers or supervisors also is a mandatory subject of bargaining. *Regal Cinemas*, supra. Given SMG Watertown's subcontracting of bargaining unit work and its transfer of that work to a supervisor, the *Fibreboard/Torrington* framework is the appropriate one to apply to this case.[54]

[52] The case relied upon by SMG Watertown to argue its elimination of live broadcasts through voice tracking was a change in scope and direction does not alter this conclusion. In *KGTV*, 355 NLRB 1283 (2010), the Board found that a television station had no obligation to bargain over the decision to lay off three employees, as a result of the station eliminating a Sunday morning newscast. In doing so, the Board concluded the involved union had sufficient notice of the layoffs, but failed to request bargaining. SMG Watertown acknowledges the Board decision does not address the issue presented here, but claims the administrative law judge concluded that the station was not required to bargain over the elimination of the newscast. Id. at 1297. However, that is not the case. The judge stated that no party disputed that the decision to discontinue the program was solely a managerial one and a non-mandatory subject. Thus, the issue was not before the judge. In any event, even if the case was applicable, KGTV's decision to eliminate a newscast is akin to a partial closure of its business and, thus, the *First National Maintenance* framework applies. Here, SMG Watertown did not close, in whole or in part, its business.

[53] The record evidence is insufficient to establish that SMG Watertown's implementation of voice tracking involved a substantial capital investment. Stephens testified that SMG Watertown already had some ability to voice track, which it utilized at the time of the layoffs and other unilateral changes. (Tr. 540–541.) However, the company wanted to upgrade its equipment to the current technology. Therefore, sometime later in the fall of 2018, the company purchased that additional voice tracking equipment. (Tr. 565.) However, no further details concerning the purchase were introduced, including its cost.

[54] In reaching this conclusion, I have considered that Stephens' desire to implement voice tracking in Watertown was motivated, in part, by the economic profitability of his business. (Tr. 538–540.) The pool of available on-air personalities skyrockets through the use of this technology, because it eliminates the need for a physical presence in studio and allows a single radio personality to be heard in multiple markets, even at the same time. One of Stephens' reasons for implementing voice tracking was to be able to put the best talent on the air from anywhere. Doing so logically would be expected to increase listenership, which in turn increases advertising revenue. Nonetheless, any future move to replace a unit employee with an on-air personality with the "best talent" still will involve the subcontracting of unit work and remains a mandatory subject of bargaining. I further note that Stephens' and Kings' testimony on this subject was conclusory and unsupported by any evidence that the unilateral changes it made were driven by the talent of the on-air personalities involved. SMG Watertown presented no evidence that the audience ratings for Stoffel and Miller were higher than for those unit employees who were laid off. Stephens also admitted that, at least initially, SMG Watertown was temporarily going to utilize on-air personalities located

Moreover, SMG Watertown was motivated to implement voice tracking, in part, because it would lower labor costs. Voice tracking significantly reduces the number of work hours needed to fill on-air shifts. Before voice tracking, an on-air personality would work in studio for the entirety of a 4- to 6-hour broadcast. Producing the same show through voice tracking requires a fraction of that time, because the disc jockeys record all at once what they say over the air. Soboleski, a program director, acknowledged in his testimony that on-air personalities who voice tracked would only be paid for the time spent in production, not the entire time the show was on the air as in the past.[55] (Soboleski also told Gaskin that her show was being eliminated because "some cuts had been made in Tulsa by corporate.") As a result of the production-time decrease, the company also can employ fewer on-air personalities to fill the broadcasts of its four Watertown stations. When Stoffel was brought back, he voice-tracked his old, on-air shift and another one on a different station. Miller, the subcontractor, was covering two broadcasts. The substantial reduction in production time and in the need for disc jockeys is a form of labor costs savings. See *O.G.S. Technologies*, supra. Finally, when SMG Watertown subcontracted the two on-air shifts to Miller, it paid her 80 percent less in gross wages than what it was paying Chase and Laverghetta combined for their two broadcasts.[56] Thus, the capabilities of voice tracking presented SMG Watertown with multiple avenues to reduce labor costs. By taking advantage of those opportunities, the company demonstrated that its decision to utilize voice tracking was motivated, in part, by economic reasons, i.e. labor costs. Where a decision is motivated, in part, by economic reasons, it is a mandatory subject of bargaining. *Pan-American Grain Co.*, 351 NLRB 1412, 1413–1414 (2007) (layoffs due to both economic reasons and automation were a mandatory subject of bargaining).

SMG Watertown's decision to implement voice tracking and eliminate live broadcasting for certain of its radio broadcasts was not a change in the scope and direction of its business.[57] The company was not privileged to unilaterally lay off unit employees, reduce their work hours, or transfer bargaining unit work to nonunit employees because of voice tracking. The company's unilateral changes violated Section 8(a)(5).[58]

*C. Did SMG Watertown Deal Directly With its Employees?*

The General Counsel's complaint alleges that SMG Watertown bypassed the Union and dealt directly with unit employees following its impasse declaration. The allegation is premised upon Curry and Kreutter asking Shannon to expand his Z93 wind show to 2 days each weekend and offering Stoffel the newly-created position of production and social media director.

Direct dealing in violation of Section 8(a)(5) is shown where an employer communicates with represented employees to the exclusion of their union for the purpose of establishing working conditions or making changes regarding a mandatory subject of bargaining. *Permanente Medical Group*, 332 NLRB 1143, 1144–1145 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995). The established criteria for finding that an employer has engaged in unlawful direct dealing are that (1) the

in Tulsa, where SMG is headquartered. (Tr. 547.) Such a move had nothing to do with talent. Finally, although King stated at the table that the company needed voice tracking to remain competitive in the marketplace, he offered no specific support for the claim. SMG Watertown also did not introduce any evidence to establish it.

[55] Tr. 588–589.

[56] As previously noted, the subcontractor, Miller, is paid $866.66 per month for two shifts. Chase made approximately $2,500 per month and Laverghetta about $1,800. Thus, the company is paying Miller about $3,400, or 80 percent, less per month.

[57] Even if the *First National Maintenance* framework applied, the outcome would remain the same. This case would fall into category 3 of *First National Maintenance*. Economic profitability was one of SMG Watertown's motivations for implementing voice tracking. The implementation also had a direct impact on unit employees' employment, because it resulted in layoffs, reductions in shifts and work hours, and the transfer of unit work to a supervisor. Applying the required balancing test, the benefit, from labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business. The parties themselves have demonstrated that the implementation of voice tracking is amenable to resolution through the bargaining process. SMG Watertown brought the issue to the bargaining table and began negotiating over it. Furthermore, at the bargaining session on October 22 following its declaration of impasse, the parties developed the framework of a potential agreement over voice tracking and layoffs, pursuant to which the Union would have a limited right to bargain over any proposed layoff of an on-air personality. Thus, the implementation of voice tracking likewise would be a mandatory subject of bargaining under *First National Maintenance.*

[58] If the implementation of voice tracking was a change in scope and direction and a non-mandatory subject of bargaining, SMG Watertown still would have an obligation to bargain over the effects of that decision. *First National Maintenance Corp. v. NLRB,* 452 U.S. at 681; *Litton Business Systems,* 286 NLRB 817, 819–821 (1987), enfd. in relevant part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990), revd. in part on other grounds 501 U.S. 190 (1991). The unilateral changes flowed from the company's voice-tracking implementation. Thus, to avoid effects bargaining, SMG Watertown would bear the burden of establishing that its layoffs and other unilateral changes were the inevitable consequences of that non-bargainable decision. *Fresno Bee*, 339 NLRB at 1214–1215. To do so, the company had to show not only that the changes resulted directly from voice tracking, but also that there was no possibility of an alternative change in terms and conditions of employment that would have warranted bargaining. *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368–1369 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996) (some citations omitted). The company has not met its burden. Voice tracking permitted the company to move from live to pre-recorded broadcasts, but did not mandate that it lay off all unit employees, reduce their hours, or transfer bargaining unit work to nonunit employees as a result. The existing on-air personalities could have continued to perform their shows utilizing voice tracking and take on new duties due to the production efficiencies from the technology. In fact, that is precisely what the company did when it laid off Stoffel and then rehired him to a supervisory position. Stoffel continued to perform his old morning-drive show through voice tracking and took on new social media duties. Stoffel could have remained a unit employee in his new role. Moreover, the company could have shifted all or some of the other bargaining unit members into similar roles, something it was contemplating given that Curry solicited Laverghetta to pursue new job opportunities with SMG Watertown after he was laid off. Finally, Stephens could have used a part-time unit employee to fill Tracey's shift after she resigned, instead of voice tracking it, but chose not to due to concerns about part-timers' skill sets. SMG Watertown's unilateral changes were not an inevitable consequence of implementing voice tracking.

[employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citations omitted).

In *Kiro, Inc.*, 317 NLRB 1325 (1995), a television station decided to add an additional newscast on a different station utilizing existing unit employees who performed before the microphone or camera during other newscasts. The creation of the additional newscast modified the working conditions of several of the newscasters. Relying upon *First National Maintenance*, the Board held the station's decision to add the newscast was not a mandatory subject of bargaining. It categorized the decision as one involving a choice of product type and method of product distribution, with the goal of increasing viewership and advertising revenue. In addition, the decision had only an indirect and attenuated impact on the employment relationship. As a result, the decision was in category 1 of *First National Maintenance.*

SMG Watertown's decision to expand the Z93Wind weekend show from one to two broadcasts was a choice of product type and is akin to the decision in *Kiro, Inc.* to create an additional newscast. Inherent in Curry's desire to expand the show was the view that listeners enjoyed the broadcast and would like to hear more of it. As with the additional newscast in *Kiro*, more listeners would generate more advertising revenue for SMG Watertown. Furthermore, unlike the layoffs, the change had no impact on Shannon's total work hours, given the efficiencies from voice tracking. Thus, the decision to expand the Z93Wind show was not a mandatory subject of bargaining. As a result, Curry could not have engaged in direct dealing.

In contrast, SMG Watertown's creation of the new production and social media director position was a mandatory subject of bargaining, because it involved a transfer of bargaining unit work. No dispute exists that Stoffel continued to perform his previous on-air shift after being hired into the new position. Although the company was free to create a supervisory position involving new social media duties, it was not free to unilaterally move Stoffel's bargaining unit work to the new supervisory position. Furthermore, when offering Stoffel the new position, Stephens and Curry communicated directly with him to the exclusion of the Union. The new position also changed Stoffel's conditions of employment, including his job duties and wages. Thus, SMG Watertown engaged in direct dealing over this mandatory subject in violation of Section 8(a)(5).

### *D. Did SMG Watertown Unlawfully Delay in Providing Relevant Information to the Union?*

The General Counsel's complaint alleges that SMG Watertown delayed in providing relevant information the Union requested following the layoffs of unit employees.[59]

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Endo Painting Service*, 360 NLRB 485, 485 (2014), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as the bargaining representative. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

Here, no dispute exists that all of the information requested by the Union following the layoffs concerned the working conditions of unit employees and thus was presumptively relevant. Nonetheless, SMG Watertown contends it had no duty to furnish the requested information, because the Union was using its requests for pretrial discovery. It is well-established that the Board's procedures do not include pretrial discovery. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 543–544 (2003). When information is sought that relates to pending unfair labor practice charges, the Board generally will not find that a refusal to provide that information violates Section 8(a)(5). See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 877 (1995); *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992), enfd. 1 F.3d 486 (7th Cir. 1993).

On August 24, the Union filed its initial unfair labor practice charge against the company. Among the charge allegations were that SMG Watertown's layoff of Chase, Laverghetta, and Stoffel violated both Section 8(a)(3) and (5), the layoffs of part-time employees violated Section 8(a)(5) as well, and the company had unilaterally changed the layoff and seniority provisions in the collective-bargaining agreement. The Union submitted its two information requests on August 25 and 26, within 2 days of filing the charge. The timing of those submissions in relation to the charge filing supports a finding that the requests were being used for pretrial discovery. As for the information requested, the Union sought the written layoff notices given to laid off employees, as well as any other written notices given to bargaining unit employees the prior week. Those requests plainly relate to the charge allegation that SMG Watertown unlawfully laid off employees. The Union also requested a current seniority list, the personnel files of all current unit employees, information concerning the work hours of part-time employees, and leave accrual and usage of bargaining unit employees. All of these requests likewise seek information related to the charge allegations. The seniority list would enable the Union to determine the order of layoffs as called for by the contract provision. Personnel files, among other things, could provide disparate treatment evidence pertaining to the Section 8(a)(3) layoff allegation. The work hours and leave accrual of employees address both the seniority provision as well as potential backpay if the layoffs were found unlawful.

[59] The complaint originally alleged refusals to provide information. At the hearing, the General Counsel amended the allegations to reflect finite time periods (August 25, 2018 to February 11, 2019 and August 26, 2018 to April 17, 2019) during which SMG Watertown refused to provide the information. Although the General Counsel did not specifically amend the complaint to allege delays in providing information, the amendments are sufficient to put SMG Watertown on notice of that allegation. In any event, a failure-to-provide-requested-information allegation is closely related to and encompasses the failure to timely provide the same information. *Finn Industries, Inc.*, 314 NLRB 556, 558 fn. 12 (1994).

Additionally, the Union conceded that at least some of the requested information addressed matters alleged in the charge. Gabalski wrote in his August 28 email to King that all of the items requested were "related to the layoffs."[60] In addition, when asked directly at the hearing if the Union was using its information requests for pretrial discovery, Gabalski did not deny the accusation. Instead, he responded: "We required information for our purposes."[61] In any event, even if the Union could have used the information for representational purposes, it is not producible as a substitute for discovery. *Frontier Hotel & Casino*, supra.

Thus, I conclude SMG Watertown did not unlawfully delay in providing relevant information to the Union and recommend dismissal of these complaint allegations. *Saginaw Control and Engineering*, supra.

*E. Did Respondent SMG Watertown Engage in Surface Bargaining?*

The General Counsel's complaint alleges that, from May 2, 2018 to October 22, 2018, SMG Watertown violated Section 8(a)(5) by engaging in surface bargaining with no intention of reaching a successor collective-bargaining agreement.

The duty to bargain in good faith under Section 8(d) of the Act requires both the employer and the union to negotiate with a "'sincere purpose to find a basis of agreement,'" *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960)). Although the statute cannot compel a party to make a concession, an employer is, nonetheless, "'obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.'" Ibid. (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). (Emphasis in original.) Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, supra. The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, and efforts to bypass the union. *Atlanta Hilton & Tower*, supra at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000).

"Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining." *PSO*, supra, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *PSO*, supra at 487–488. This includes proposals that require a union to cede its representational functions. *Regency Service Carts*, 345 NLRB 671, 675 (2005).

Given SMG Watertown's totality of conduct from May 2 to October 22, I conclude it did not engage in surface bargaining. Admittedly, SMG Watertown violated Section 8(a)(5) by implementing unilateral changes in unit employees' working conditions at a time when no valid impasse had been reached. It also dealt directly with one employee after the premature impasse declaration. These unlawful actions support a finding of surface bargaining. *Regency Service Carts*, supra at 671; *Grosvenor Resort*, 336 NLRB 613, 616–617 (2001).[62]

Nonetheless, I do not find that King's conduct in bargaining indicates an intention not to reach an agreement. Stephens wanted to modernize his stations' operations and transition to voice tracking, so he asked King to address it in bargaining. The appeal to a radio station of voice tracking from a business standpoint is obvious. King was open with the Union about Stephens' desire from the start of negotiations and about the need for more flexibility when it came to replacing on-air talent. Nearly all of King's initial contract proposals, including both the elimination of layoff protection and of implementing layoffs by seniority, were designed to enable the company to modernize in that fashion. Although the General Counsel contends that the company's proposals were predictably unacceptable, I do not agree. Stephens and King recognized that the voice-tracking implementation could lead to a reduction in unit work and initial layoffs of on-air personalities. Thus, they sought to soften the blow by offering the possibility of creating new, higher paid positions with additional job duties. In addition, King's initial proposals must be evaluated in light of how atypical and constraining the 1-year layoff protection in the collective-bargaining agreement is to the operation of a business. This lack of flexibility, in particular when the employer is in the entertainment business, is substantial. Finally, the parties did not make any progress on the layoffs provision during the first 3 days of bargaining, because the

[60] Jt. Exh. 26, p. 2.

[61] Tr. 138.

[62] As to away-from-the-table conduct and as will be discussed fully below, SMG Watertown also violated Sec. 8(a)(1) by unlawfully interrogating employees, when Curry asked Laverghetta in August whether Laverghetta would cross a picket line.

Union had not submitted a counterproposal to King. After it did, Gabalski insisted that any further discussion about the provision take place in person. That King stuck to his position that the company needed contract provisions enabling it to implement voice tracking is not any more indicative of bad-faith bargaining than the Union refusing to agree to the use of voice tracking for anything but a temporary need. Accordingly, I conclude that SMG Watertown's contract proposals do not support a finding of bad faith.

Beyond that, King's testimony at the hearing was sincere and credibly demonstrated that he actually believed the parties had reached an impasse in bargaining in August.[63] All of SMG Watertown's unilateral change violations were due to King's conclusion being erroneous, but coming to the wrong conclusion about the existence of an impasse does not mean that King never intended to reach an agreement. Indeed, King returned to the table on October 22 after the impasse declaration and the parties made progress on a potential resolution to the layoffs issue, one which would have given the Union an opportunity to bargain before an employee was laid off. Likewise, I found Stephens credible and genuine when he testified that he "absolutely" wanted to get a deal with the Union and recognized the company still needed to get a contract in place, irrespective of this litigation.[64]

The General Counsel also argues that surface bargaining is demonstrated by the fact that it took King 5 weeks, from May 2 to June 7, to provide Murray with the company's initial contract counterproposals. I find no merit to this contention. This was the first time King was bargaining for SMG in Watertown and Massena. He was brought in to secure the ability of the company to voice track. As a result, King had to undertake a comprehensive review of both collective-bargaining agreements after Murray submitted the Union's initial proposals. He also had to draft numerous, significant counterproposals to address the implementation of voice tracking. Finally, King found numerous areas of outdated language in the contracts which needed to be updated. Under these circumstances, the 5-week period to respond is understandable.

For all these reasons, I conclude that, although Respondent SMG Watertown prematurely declared impasse and thereafter made unlawful unilateral changes, it did not engage in surface bargaining. *A.M.F. Bowling Co., Inc.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995); *Larsdale, Inc.*, 310 NLRB 1317 (1993).

### *F. Did SMG Massena Refuse to Meet at Reasonable Times to Negotiate a Successor Contract?*

The General Counsel's complaint alleges that Respondent SMG Massena violated Section 8(a)(5) by refusing to meet at reasonable times for the purpose of negotiating a successor collective-bargaining agreement.

Section 8(d) of the Act requires that an "employer and the representative of the employees . . . meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . ." The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Garden Ridge Management, Inc.*, 347 NLRB 131, 132 (2006), citing *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998). As the Board stated long ago:

> The obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

*Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op at 5 (2018), quoting *J.H. Rutter-Rex Mfg. Co.,* 86 NLRB 470, 506 (1949).

The parties never held a session to bargain a successor contract for SMG Massena. The reason for this was King's desire to utilize the SMG Watertown contract as the baseline for the SMG Massena agreement. However, the Union never agreed to do so. In his June 7 email to Murray, King said he would presume the language agreed upon for the Watertown contract would apply in Massena, unless Murray advised him that the Massena contract required different language. Thereafter, Murray responded by telling him the two contracts always had been separate. He also told King the Union might find merging the contracts acceptable, but not without time, comparison, and face-to-face bargaining. Murray then asked for dates for negotiations in both locations. Moreover, Murray rightly told King that combining the contracts was a permissive subject of bargaining. *Boston Edison Co.*, 290 NLRB 549, 553 (1988) (although parties may voluntarily consent to bargaining jointly on a basis other than the established appropriate unit, no party may be forced to bargain on other than a unit basis). When Gabalski took over, he and King agreed to the negotiation dates in August and scheduled bargaining for Watertown and Massena at different times during those sessions. Thus, King should have been aware that the Union was not agreeing to combine the contracts or use the Watertown agreement as a baseline.

The additional communication from Gabalski to King after the August 22 declaration of impasse solidifies that conclusion. On September 10 and 21, Gabalski asked for dates to begin bargaining for Massena. King never responded to either of those specific requests, instead treating the negotiations as combined and offering general bargaining dates to Gabalski thereafter. Despite the Union's lack of agreement to combined bargaining, King wrote "Massena" on top of the bargaining sign-in sheet on October 22 and questioned the union representatives regarding their authority to bargain for Massena. When King proposed bargaining dates thereafter, he indicated they were for the purpose of bargaining over the issues at which the parties remained at impasse, meaning the SMG Watertown negotiations.

[63] Tr. 361–364.

[64] Tr. 545. I reject the General Counsel's contention that Stephens' testimony establishes SMG Watertown was going to implement voice tracking and lay off unit employees, irrespective of how bargaining went. (Tr. 560–564.)

Finally, at no point did King ever respond to the Union's initial May 2 contract proposal for the Massena bargaining unit, aside from wage increases.

Given these facts, I conclude the Union never agreed to merge the Watertown and Massena contract negotiations.[65] Thus, despite the Union's repeated requests, King never met with the Union to negotiate a successor contract for the Massena bargaining unit. It goes without saying that the statutory requirement to meet at reasonable times cannot be fulfilled where a party never meets to bargain a contract. King's failure to ever agree to dates to bargain a successor contract for Massena violated Section 8(d) and 8(a)(5). *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115–1116 (1999) (employer refused to meet at reasonable times where it failed to respond to union's requests for meeting on at least three occasions and never met with the union after two negotiation sessions).

### *G. Did SMG Watertown Violate Section 8(a)(1) by Interrogating Employees Concerning Their Union Activities?*

Finally, the General Counsel's complaint alleges that SMG Watertown violated Section 8(a)(1), when General Manager Curry interrogated unit employee Laverghetta about his union activities during conversations on August 16 and 17.

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). A non-exhaustive list of factors to consider includes the background between the employer and union; the nature of the information sought; the identity of the questioner; the place and method of interrogation; the truthfulness of the employee's reply; and whether the employee was an open and active union supporter. *Westwood Health Care Ctr.*, 330 NLRB 935, 939–940 (2000); *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). None of these factors are to be mechanically applied in each. *Rossmore House*, supra at 1178 fn. 20.

Based on my credibility determination described above, I found that, as negotiations were ongoing, Curry asked Laverghetta on August 16 if he would cross a picket line in the event of a strike. The next day, Curry told Laverghetta he had informed Stephens that Laverghetta would cross a picket line. Both comments were accompanied by Curry's statements that negotiations were heated and not going well.

Questioning employees regarding their intention to participate in a strike, with certain exceptions, is inherently coercive and tends to interfere with employees' Section 7 rights. *Transportation Management*, 257 NLRB 760, 767 (1981). To lawfully question an employee about strike participation requires fully explaining the purpose of the question, assuring employees that no reprisal would be taken as a result of their response, and otherwise not creating a coercive atmosphere. *Preterm, Inc.*, 240 NLRB 654, 656 (1979). An employer may poll employees regarding their strike intentions where it has a reasonable basis for believing a strike is imminent such that the employer has a legitimate need to determine its ability to adequately staff its operations. *W.A. Sheaffer Pen Co.*, 199 NLRB 242, 243 (1972). In this case, no evidence exists as to the information upon which Curry was basing his suggestion that a strike might occur. Curry did not explain to Laverghetta why he was asking if Laverghetta would cross a picket line. He did not tell Laverghetta he was trying to determine if the radio stations could continue to operate in the event of the strike. He failed to assure Laverghetta that the latter's response to Curry's inquiry would not result in reprisals, something Laverghetta seemingly feared given his lack of response to Curry's inquiry. As a result, Curry's statements to Laverghetta were coercive.

That conclusion is further solidified by an examination of the *Rossmore House* factors.

Curry was the general manager of SMG Watertown, its highest-level position at that physical location. Both conversations were one-on-one, with the first taking place in the studio and the second in Curry's office. Although SMG Watertown and the Union had an uneventful, peaceful bargaining relationship in the recent past, the negotiations going on at the time were exactly as Curry described them—heated. Curry was attempting to discover if Laverghetta would obviate the need to bring in at least one replacement employee in the event of a strike. Laverghetta did not respond to Curry in either of the conversations, indicating unease with the subject matter even though he was not an open union supporter.

As a result, I find Curry's statements to Laverghetta violate Section 8(a)(1). *Ferragon Corp.*, 318 NLRB 359, 368–369 (1995); *Smith's Complete Market*, 237 NLRB 1424, 1428 (1978).

## II. RESPONDENT SMG MASSENA'S DISCHARGE OF DAVID ROMIGH

### FINDINGS OF FACT

David Romigh worked as an on-air personality at WMSA-AM in Massena from April 2016 to June 8, 2018. He was the weekday morning drive host, a broadcast which lasted from 6 a.m. to noon. His work shift began at 4:30 a.m. When he was not on air, Romigh was responsible for doing production work. He also worked remote broadcasts outside of the studio. Following his hiring, Romigh served as the union's shop steward in Massena. During Romigh's employment, Curry, the Watertown general manager, also served in the same position in Massena. Curry was physically at the Massena location typically 1 day per week. Todd Truax was the program director for three stations in Massena, including WMSA-AM. Truax hired Romigh and supervised him until Truax's departure in February 2018. Thereafter, Jason Sharlow became program director and was Romigh's direct supervisor. Sharlow began working for SMG Massena in February 2017. Prior to becoming program director, Sharlow worked as a station manager, a position above Romigh in SMG Massena's job hierarchy. Julianne Fowler worked as an account

[65] In reaching this conclusion, I also rely upon and credit Gabalski's testimony that the Union never agreed to merge bargaining. (Tr. 73.) I do not credit King's hedged testimony to the contrary. (Tr. 330, 340.) King claimed the parties understood that they were bargaining for both locations, but provided no specifics concerning how he came to that understanding.

executive, a non-supervisory position.

*A. Romigh's Job Performance*

Romigh was a talented, on-air performer. However, throughout his tenure, he had job performance issues. First, on September 26, 2017, Truax and Fowler learned of an incident involving Romigh while he was working at his second job at Home Depot. Romigh told a customer he was assisting that he hated the Massena Memorial Hospital and played its commercials on the radio only because he was required to do so. Unbeknownst to Romigh at the time, the customer was the secretary of the hospital's chief executive officer. Moreover, the hospital then was the station's second biggest advertiser and had been advertising with WMSA-AM since the station began operations in 1946. After learning of this, Curry, Sharlow, and Fowler called the secretary and apologized for Romigh's actions. Sharlow also drafted a written disciplinary form for Romigh as a result of the secretary's complaint. He and Truax signed the form and placed it in Romigh's personnel file, but Romigh never signed or received it.[66]

In January 2018, Truax twice corrected Romigh's timecard entries, because he arrived half an hour late for his 5 a.m. shift but put down 4:30 a.m. as his start time. Romigh showed up late and left early frequently enough that, at some point, Truax spoke to him about it. Truax told Romigh that Truax did not want to sign his timecard if it falsely showed Romigh was working his full shift when he had not. Romigh responded that he would make up the time.[67]

After Sharlow became program director of WMSA-AM in February, he regularly listened to the station to monitor its broadcasts. Sharlow consistently heard "dead air" during Romigh's broadcast, meaning no sound was coming through when he tuned in to the radio station. Prior to becoming program director, Sharlow personally heard Truax wake Romigh up in the studio on many occasions. Sharlow also assigned Romigh commercials to record, which could be completed the same day during Romigh's on-air show while music was playing. However, Romigh sometimes would not have recorded the commercials 2 days later.[68] Sharlow asked Romigh once a week for over a year to record promos but, save for one time, Romigh refused to complete them. Finally, Sharlow repeatedly heard Romigh yelling at Don Despaw, another on-air personality whose broadcast followed Romigh's morning drive. Romigh took issue when he smelled Despaw's lunch or when Despaw smelled like cigarettes.[69]

At no point did SMG Massena discipline Romigh for his variety of performance issues.

*B. The Union Learns of Curry's Alleged Verbal Abuse of Tracey*

Also in February, Tracey submitted a complaint to Chase alleging that Curry had verbally abused her. Chase told Stephens about the confrontation and Stephens responded that he would investigate it. After completing the investigation, Stephens told Chase he had spoken to several employees about Curry's personality and he was going to require Curry to attend anger management training. Chase advised all of her union executive board members and Romigh about the investigation.[70]

In April 2018, Romigh told other bargaining unit employees in Massena that Curry had been under investigation for sexual harassment of a couple on-air jocks in Watertown. He also said Curry had been told to take anger management classes.[71]

At some, unidentified point shortly thereafter, Sharlow told Curry that Romigh was spreading rumors about Curry in Massena.[72]

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[66] Tr. 184, 612–617, 640–641, 736–737; GC Exh. 23, p. 5, R. Exh. 2, p. 121. The factual account of the alleged Home Depot incident is premised upon a contemporaneous statement written by Fowler and submitted to Truax and Sharlow. Counsel for the General Counsel introduced the record into evidence, absent objection. Romigh testified but not about this topic, including to deny that the incident occurred. The secretary did not testify. As will be discussed further, Curry relied upon this incident as one of his justifications for discharging Romigh. (GC Exh. 23, pp. 2–3.) As for the disciplinary form, the record evidence is insufficient to establish that Romigh received a copy of it. Curry testified that Truax gave Romigh the form, but Truax did not testify about the issue. Sharlow stated he gave it to Curry, who had to approve and issue any employee discipline. (Tr. 613–614, 737, 754–755.)

[67] Tr. 165–167, 176–177; GC Exh. 23, pp. 8, 10. I credit Truax's testimony that he corrected Romigh's timecards in January, because Romigh arrived late to work. Employees at SMG Massena fill out their timecards in the middle of a pay period, after only one of the two weeks has been worked. This necessarily means that timecards may need to be corrected. However, Romigh testified only generally about the procedures he used to fill out his timecard and I found his testimony unconvincing. (Tr. 253–256.) He did not address the two January corrections made to his timecards by Truax. Romigh testified that, if he worked less hours than his scheduled shift, he would report that to the Massena office manager, so his timesheet reflected the proper hours. But he did not say he had done that in January. Romigh also stated that, around the beginning of April, Sharlow told him he could come in at 5 a.m. instead of 4:30 a.m., because Romigh was producing a new half-hour segment reporting major league baseball game highlights. However, major league baseball does not play games in January, so that explanation would not apply to Romigh's January timecards.

[68] Truax also asked Romigh to record commercials when he was in studio, but Romigh did not timely finish them. (Tr. 170–171.)

[69] Tr. 724–726, 730–731, 733–735, 740–742. I credit Sharlow's account of Romigh's job performance issues. Sharlow's testimony was specific, confident, and candid. He readily acknowledged what he did not know or recall. His demeanor also was indicative of reliable testimony. Moreover, both Truax and Elijah Winfrey, another on-air personality, corroborated Sharlow's account that Romigh frequently fell asleep while on the air. (Tr. 169–170, 181–182, 774, 775–777.) Even Romigh admitted to falling asleep on air "[f]rom time to time, for a moment or two at a time." (Tr. 256–257, 270–271.) Romigh also conceded that both Curry and Truax spoke to him at different times about falling asleep on air. Chase also testified that she participated in a call with Curry and Romigh in August or September 2017 during which Curry told Romigh he needed to stay awake and Romigh agreed to do so. (Tr. 198–199.)

[70] Tr. 199–203; 565–566, 571–573.

[71] Tr. 261–262. It is not clear why Romigh stated Curry was accused of sexual harassment, as opposed to verbal abuse as testified to by Chase. It also is not clear why Romigh said "a couple" of disc jockeys were involved. Nonetheless, irrespective of whether Curry's conduct was described as verbal abuse or harassment of an employee, the complaint concerned his mistreatment of a unit employee.

[72] Tr. 770–771. Sharlow could not recall when he told Curry this. Curry stated in communication with the Union following Romigh's discharge that he learned of Romigh spreading rumors about him in March. However, Romigh testified his conversation with other union members

### *C. Curry's Discharge of Romigh*

On Friday, May 11, Romigh was scheduled to broadcast remotely in the evening from the Port Theater, which is located about 10 minutes from Massena across the border in Canada. During the week prior to the event, the theater and the radio station advertised his scheduled appearance. That Friday evening, the theater owner called Sharlow and told him Romigh was a no-show. The owner threatened to pull his advertising from the station which, at the time, was the third largest advertising contract. The following Monday, May 14, Sharlow asked Romigh if he had shown up at the event. Romigh told him no. Sharlow then reported Romigh's no-show to Curry. The two spoke to the theater owner and offered him a substantial amount of free advertising to retain his business. Sharlow also wrote up and signed a written warning for Romigh, although again Romigh neither signed nor received a copy of the form.[73]

Later on in May, Sharlow again observed Romigh sleeping while on air. When Sharlow reported it to Curry, he told Sharlow to take a picture of Romigh sleeping in the studio and send it to Curry. Sharlow did so on May 18 and May 29. At the end of May, Curry asked SMG Massena on-air personality Elijah Winfrey to photograph any occasions when Romigh was late to work. On June 4, Winfrey observed that Romigh was not in the SMG Massena building, and his car was not in the facility's parking lot, as of 4:56 a.m., despite Romigh's 4:30 a.m. start time. Winfrey photographed the parking lot without Romigh's car in it, then sent it to Curry.[74]

On May 29, Curry sent Romigh an email[75] in which he stated:

> As radio owners and operators, we are mandated by the FCC to provide current issues reports for upload to the FCC website. After numerous efforts on my behalf and Jason's this has not happened, earlier today I even asked "why," to which, still no response. We are assessing this now, and will go through proper procedure to address this.

In response, Romigh submitted his second quarter FCC report to Curry on May 30.[76]

On June 7, Curry completed his anger management training course.[77]

On June 8, Sharlow twice observed Romigh asleep in the studio and woke him up both times. Sharlow took a picture of Romigh to document the conduct. When Romigh's radio shift ended, Sharlow called him into Sharlow's office. Curry was on the phone there and told Romigh he was terminated. Curry advised Chase of Romigh's discharge the same day. He told her it was due to insubordination and falsification of timecards.[78]

### *D. Curry's Communication with Chase Concerning the Reasons for Romigh's Discharge*

On June 11, Curry sent Chase a letter explaining his reasons for discharging Romigh. Curry wrote "his dismissal was based on a series of things, but the primary reason for his dismissal from WMSA was insubordination." He listed the following five incidents of claimed insubordination: (1) consistent refusal to produce radio promos in a timely manner; (2) falsifying timecard; (3) not taking action enough when caught sleeping on air (four separate incidents); (4) missed an event at a client location without calling in to that client on the day of the event; and (5) spreading rumors about management.[79]

On June 12, Chase sent Curry an information request regarding Romigh's termination. Among her requests, Chase sought a "complete list of the allegations referred to in [Curry's] June 8, 2018 termination letter…including names of witnesses and copies of statements or complaints from those witnesses." She also asked for "any document on file that the company used in making the decision to terminate Mr. Romigh or that the company may use to support that decision." Curry responded the same day. He included more detailed descriptions regarding Romigh falling asleep on air, falsifying his timecard, and not producing promos on time. Curry attached three photographs of Romigh allegedly sleeping in the studio. He also included the timecards from January and June 4, which Curry alleged Romigh had falsified. Curry also stated new reasons for discharging Romigh. The first was the September 2017 conversation between Romigh and the Home Depot customer who turned out to be the secretary to Massena Hospital's CEO. The second was Romigh being taken off the air in the spring of 2017 when he "rambled on about

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occurred in April. Either way, I find that Curry knew about Romigh "spreading rumors" about him prior to May.

[73] I credit Sharlow's testimony concerning the Port Theater incident. (Tr. 726–729, 760–762.) Romigh claimed that he had walking pneumonia on the day of the event and told Sharlow he did not feel up to going. (Tr. 259–261.) He stated he asked Sharlow to notify the theater for him and Sharlow agreed to do so. Romigh said he again reminded Sharlow he was not attending the event at the end of his shift that day. He further testified that, the following Monday, Sharlow told him he thought Romigh was going to be at the Port Theater. Romigh then reminded him of their prior discussion on Friday, to which Sharlow responded "hmm…" and left. Romigh's demeanor when providing this testimony appeared hesitant and untrustworthy. His account also is illogical. If he had told Sharlow twice that he was not showing up, it is implausible that Sharlow would not have found a replacement for Romigh or that Sharlow would come ask Romigh the following Monday why he did not appear. Moreover, Romigh testified that he was off air twice that week, but his attendance report reflects that he took two sick days in April, not May. The report indicates Romigh was absent for only 1 day the week prior to the Port Theater show and he took a personal, not sick, day. (R. Exh. 2, p. 103.) As to the written disciplinary form, Sharlow testified that he gave it to Curry to issue to Romigh, but Curry did not testify that he did so. (Tr. 617–618, 737–738, 754–755; R. Exh. 2, p. 122.)

[74] R. Exh. 2, pp. 135, 157–161; Tr. 623–625, 627, 755–758, 775–777.

[75] GC Exh. 31.

[76] At the hearing, Romigh's testimony concerning his alleged performance problems was abbreviated, principally consisting of general denials, and unconvincing. When he did acknowledge issues, he appeared to downplay them and avoided being completely forthcoming. For example, and as previously noted, Romigh acknowledged falling asleep on-air but not the frequency with which it occurred, as detailed by numerous other credible witnesses. Romigh also denied ever refusing to produce promotions, but did not address whether he ever had been late submitting them. (Tr. 253.) As for his interactions with Despaw, Romigh testified that Truax once told him in the spring of 2018 he needed to get out of the chair and let Despaw sit when Despaw was starting his shift. However, Romigh did not deny that he yelled at Despaw and did not elaborate further on his conversations with Despaw.

[77] Tr. 657–658; GC Exh. 32.

[78] Tr. 195–196, 251–252, 599, 725–726, 731–732; R. Exh. 2, p. 135.

[79] GC Exh. 21.

his relationship with his former girlfriend," resulting in customer complaints. The third was Romigh staying on air past his 12 p.m. shift end and mistreating Despaw. The fourth was Romigh failing to timely provide FCC reports. The fifth was a "long list of concerns" which prior Program Director Truax had regarding Romigh's performance. Finally, in elaborating regarding the spreading-rumors-about-management justification, Curry wrote:

> Dave Romigh was reported as spreading rumors about me too. He told a staff member (also a union member) that the union was looking to remove me as Market Manager of Stephens Media. This issue was discussed between Diane and Dave the day before his dismissal and was one of the reasons Dave would not get backing from the union for his dismissal. I was also told by an employee that Dave was very upset with me for being late for a meeting I set up with him one afternoon. Again, an unreasonable reaction to a superior.

In addition to the photographs and timecards, Curry included Fowler's September 26, 2017 statement describing Romigh's Home Depot incident. He also attached a list of issues with Romigh that Truax wrote from May 17 to August 14, 2017. Finally, Curry attached a statement from Winfrey written in the fall of 2017 concerning Romigh's alleged mistreatment of Despaw.[80]

On June 29, Curry sent a third letter to Chase, this time regarding her request for the names, witnesses, and additional details on his reasons for discharging Romigh. He stated he made an internal request to Massena staff for this information. He also said he had "come up with information that I believe reinforces our reasoning for Dave's dismissal." In his letter, Curry elaborated on Romigh's alleged failure to show for the remote broadcast at the Port Theater. Regarding the spreading rumors justification, Curry wrote:

> I consider myself a reasonable man, but I was constantly given reasons to terminate Dave, to which I would say to myself, I'll give him another chance. Then, starting this past March, I was told by Jason Sharlow that Dave Romigh was telling another union member that the NABET union was looking to remove me as Market Manager because of an issue in Watertown. I never said anything, and I remained neutral and calm. This was an approach I learned directly from an "Anger Management" course I took after an issue I was responsible for after an issued I created (sic) with a union employee in Watertown. Of course, this issue isn't about me, it's about Dave Romigh, but his rumor about me spread throughout the building and made me feel I was on a short leash. I was never in such a situation like that in my whole life, and needless to say, I was relieved when I heard from an employee that the rumor was untrue. In fact, it was after Dave had a discussion with you Dianne, and you corrected Dave that he was wrong.

Curry attached a statement from Sharlow dated June 28 stating Sharlow's complaints about Romigh's work performance; a similar statement dated June 27 from Belynda Sharlow, an office and production manager for SMG Massena who is married to Jason Sharlow; and an undated statement from employee James McDonald regarding the Port Theater incident. Curry also resubmitted the September 26, 2017 statement from Fowler to Sharlow detailing the Home Depot incident, as well as Truax's list of complaints from the summer of 2017.[81]

After June, Curry no longer served as general manager at SMG Massena.[82]

## ANALYSIS

The General Counsel alleges that Respondent SMG Massena discharged David Romigh due to his union and protected concerted activity, in violation of Section 8(a)(1) and (3).

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is inherently a causation test. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*, supra, 251 NLRB at 1089 ("[The Board's] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment."). To prove a discriminatory discharge under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the employer's discharge decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). The General Counsel satisfies the initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have discharged the employee even in the absence of the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.,* 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons and its *Wright Line* defense necessarily fails. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

To begin, the General Counsel and SMG Massena disagree as to whether Romigh engaged in any protected conduct. Relying

[80] GC Exh. 23.

[81] GC Exh. 25. At one point in Curry's testimony concerning statements he obtained after Romigh's discharge, Respondents' counsel asked Curry if he requested that Winfrey write a statement. Curry responded: "I asked Mr. Winfrey and others to come up with—rather, to speak of incidents where they felt that Mr. Romigh was out of line." (Tr. 622.)

[82] Tr. 212–213.

on *Gross Electric*, 366 NLRB No. 81 (2018), the General Counsel contends that Romigh's report to other unit employees of the investigation into alleged harassment of Tracey by Curry was protected conduct. In *Gross Electric*, a union president attended a grievance hearing before a labor-management committee where he served as one of the members. During the hearing, the president questioned the company's owner about why he rejected so many job applicants who had not previously worked for him and also criticized him for employing a supervisor whom the president believed bullied employees. The Board found that the president's conduct was protected union activity. It based the finding on the combination of two things. First, the union president's statements were directly related to union members' employment concerns and, thus, directly related to his role as union president. Second, the union president attended the grievance hearing solely in connection with his role as a union official.

Here too, Romigh's disclosure to other Massena bargaining unit employees of the harassment allegation against Curry and the requirement that he take anger management training is directly related to union members' employment concerns. That harassment of an employee by a high-level supervisor would concern other employees is self-evident. No worker wishes to be subjected to sexual, verbal, or any other kind of harassment by a supervisor in the workplace. In addition, Romigh disclosed the information to the unit employees solely in his role as a union official, because he believed it was his responsibility to do so as steward. At the time of Romigh's conduct, Curry supervised employees in both Watertown and Massena. Because the harassment complaint came from an employee in Watertown where Union President Chase worked, the responsibility for informing Massena employees about what occurred fell to Romigh as the steward. Accordingly, Romigh's conduct was protected union activity.

In any event, even if Romigh's conduct was not protected, Curry perceived that Romigh engaged in union activity. In Curry's written communications with Chase following Romigh's discharge, Curry twice wrote that he heard Romigh was telling other unit employees that the union wanted to have Curry removed from his position because of Tracey's harassment complaint. Curry knew about Romigh's conversation with unit employees, because Sharlow told him about it. An employer violates the Act when it discharges an employee because the employee either engaged in, or is believed to have engaged in, protected conduct. *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018) (finding unlawful discharge based on belief employees engaged in protected concerted activity, regardless of whether they actually did so); *Holyoke Visiting Nurses Assn.*, 310 NLRB 684, 687–688 (1993), enfd. 11 F.3d 302 (1st Cir. 1993) (violation of Sec. 8(a)(1) and (3) to take action against employee because of employer's conclusion' that she had supported a union protest). Curry perceived that Romigh engaged in both union and protected concerted activity by describing his conduct as discussing complaints about Curry with other unit employees and seeking to have Curry removed from his position as a result. *Caterpillar, Inc.*, 321 NLRB 1178, 1179 (1996), citing *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987) (attempt by employees to cause the removal of a supervisor is protected when it is evident that the supervisor's conduct had an impact on working conditions).

Accordingly, I conclude Romigh engaged in, and was perceived to have engaged in, protected conduct.[83]

As to knowledge of and animus towards this protected conduct, Curry's statements in his explanations to Chase of the reasons for Romigh's discharge are direct evidence which is more than sufficient to establish these elements of the General Counsel's initial *Wright Line* burden. Curry listed "spreading rumors" as one of the bases for Romigh's termination and explained the rumors were that the union was trying to get him replaced because of Tracey's complaint. He said the rumors made him feel like he was on a "short leash" for the first time. Animus also is demonstrated by the timing of Romigh's discharge in relation to his protected conduct and the wide variety of shifting explanations Curry provided to Chase for the discharge. After learning that Romigh was spreading rumors about him in April, Curry increased his and his supervisor's monitoring of Romigh's job performance in May. He did so, despite the fact Romigh had issues during the entirety of his employment and never had been disciplined. Curry discharged Romigh shortly thereafter and only one day after he completed his anger management course. As to shifting explanations, Curry added and expanded upon his justifications for terminating Romigh in each of his three letters to Chase following the discharge. Many of the justifications were based upon conduct which occurred well before the discharge and for which Romigh was never disciplined. Curry did not take issue with Romigh's poor job performance until after learning of his protected conduct.

Thus, because the General Counsel established all of the required initial *Wright Line* elements, the burden shifts to SMG Massena to establish it would have discharged Romigh, irrespective of his protected conduct. In assessing this question, it must be acknowledged initially that Romigh was far from a model employee. Staying awake during work—in particular, if your work is broadcasting a live radio program—is the most basic

[83] In reaching this conclusion, I have considered the brevity of the testimony which Romigh provided concerning his discussion with other employees about Curry's conduct. The entirety of it was:

> Q: Mr. Romigh, did you ever talk to the bargaining unit employees about Mr. Curry?
> A: Yes. I did.
> Q: What did you tell them?
> A: That Mr. Curry had been under investigation for sexual harassment of a couple of the on-air jocks in Watertown. And that he had been told to take anger management classes and --
> Q: And why did you tell them this information?
> A: It was my responsibility as the shop steward.

(Tr. 262.) No information was provided concerning the context of the conversation, including where this conversation took place, what specific individuals participated in it, what prompted the discussion, and what other unit employees said in response to Romigh's disclosure. Nonetheless, despite the testimony being bare bones, I find it sufficient to establish protected union activity. Even if it were not, it is enough that Curry perceived Romigh had engaged in protected activity by discussing with other unit employees how the Union wished to have Curry removed from his position due to Tracey's complaint.

requirement that any employer could have of an employee. Romigh's other transgressions, including showing up late to work, not completing work that supervisors assigned him on a timely basis, skipping a remote broadcast, and bad mouthing one of the company's largest advertisers, likewise do not paint a flattering picture. But SMG Massena tolerated the misconduct for a long time. Perhaps it did so because, as Romigh's supervisor Sharlow acknowledged, Romigh typically was a talented performer on air. Only after Curry learned of Romigh "spreading rumors" did he heighten his scrutiny of Romigh by asking Sharlow and Winfrey to take photographs of Romigh's misconduct and ultimately discharged Romigh. Irrespective of Romigh's many issues, SMG Massena had an obligation to show more than that it had legitimate reasons for discharging Romigh. It had to demonstrate that it previously discharged employees under similar circumstances or never before encountered a situation like Romigh's. SMG Massena presented no evidence to establish either thing.

Accordingly, SMG Massena's discharge of David Romigh violated Section 8(a)(3).

## CONCLUSIONS OF LAW

1. Respondents Stephens Media Group–Watertown, LLC and Stephens Media Group–Massena, LLC are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The National Association of Broadcast Employees and Technicians–Communications Workers of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit at the SMG Watertown facility in Watertown, New York:

> All broadcast technicians or engineers, all staff announcers, including announcer-operators employed by Respondent SMG Watertown.

4. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit at the SMG Massena facility in Massena, New York:

> All Announcer-Operators and Technician-Announcers (Group I and II) employed by Respondent SMG Massena.

5. Respondent SMG Watertown violated Section 8(a)(1) on August 16 and 17, 2018, by interrogating employees about their union activities, specifically about whether employees would cross a picket line in the event of a strike.

6. Respondent SMG Massena violated Section 8(a)(3) and (1) on June 8, 2018, by discharging David Romigh due to his union activities.

7. Respondent SMG Watertown violated Section 8(a)(5) and (1) on or after August 23, 2018, by making the following unilateral changes to unit employees' terms and conditions of employment at a time when SMG Watertown and the Union were not at a valid impasse in bargaining:

   a. Laying off Dianne Chase, Frank Laverghetta, and Michael Stoffel.[84]
   b. Eliminating the regularly–scheduled weekend shifts of Brian Best, Holly Gaskin, and Jeffrey Shannon.
   c. Reducing the work hours of Best and Gaskin.
   d. Transferring bargaining unit work to nonunit employees, by rehiring Stoffel to a supervisory position following his layoff and having Stoffel continue to perform his prior unit work.

8. Respondent SMG Watertown violated Section 8(a)(5) and (1) about August 24, 2018, by bypassing the Union and dealing directly with unit employee Michael Stoffel by offering him a position as production and social media director for SMG Watertown.

9. Respondent SMG Massena violated Section 8(a)(5) and (1) since on or about September 10, 2018 by refusing to meet at reasonable times with the Union for the purpose of negotiating a successor collective-bargaining agreement.

10. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

11. Respondent SMG Watertown has not violated the Act in any of the other manners alleged in the complaint.

## REMEDY

Having found that Respondent SMG Watertown and Respondent SMG Massena engaged in certain unfair labor practices, I find they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent SMG Massena violated Section 8(a)(3) by discharging David Romigh, I order it to offer Romigh full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. I also order SMG Massena to make Romigh whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), SMG Massena shall compensate Romigh for his search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New*

[84] I do not find an independent Sec. 8(a)(5) violation due to Curry's accelerated acceptance of Tracey's resignation. After submitting her resignation with a 2-week notice, Tracey was scheduled to work through August 31. However, Curry advised her on August 23 that her resignation was accepted and would go into effect immediately. Nonetheless, SMG Watertown paid her through August 31. Thus, Tracey got paid the same and did not have to work for most of her 2-week notice period. Under these circumstances, I do not find the accelerated acceptance of Tracey's resignation to constitute a material, substantial, or significant change to her working conditions. See generally *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220–221 (2005). *Campbell Electric Co.*, the case relied upon by the General Counsel to demonstrate a violation, does not warrant a different result. 340 NLRB 825, 827 (2003). The issue in that case involved the appropriate backpay period for unlawful discharges when employees had, or did not have, definitive plans to resign prior to the terminations. That issue is not presented here.

*Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. SMG Massena also must remove from its files any references to Romigh's unlawful discharge, and within 3 days thereafter, notify Romigh in writing that this has been done and that the unlawful action will not be used against him in any way.

Having found that SMG Watertown violated Section 8(a)(5) by prematurely declaring impasse and unilaterally changing terms and conditions of employment for unit employees thereafter, I order it, on request, to bargain with the Union as the exclusive collective-bargaining representative of unit employees, before implementing any changes to their wages, hours, or other terms and conditions of employment. I also order it, upon request of the Union, to retroactively restore any unilaterally modified terms and conditions of employment, and rescind the unilateral changes it has made, until such time as SMG Watertown and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations. SMG Watertown also must make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.[85]

For all backpay awards received by unit employees, I further order SMG Watertown and SMG Massena to compensate the employees for any adverse tax consequences associated with receiving lump-sum backpay awards and to file with the Regional Director for Region 3 a report allocating the backpay award to the appropriate calendar year. See *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).[86]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[87]

ORDER

Respondent Stephens Media Group–Watertown, LLC, Watertown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, including whether they are willing to cross a picket line in the event of a strike.

(b) Making unilateral changes to unit employees' terms and conditions of employment at a time when SMG Watertown and the Union were not at a valid impasse in bargaining.

(c) Bypassing the Union and dealing directly with bargaining unit employees to establish or change their working conditions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, before implementing any changes to their wages, hours, or other terms and conditions of employment:

> All broadcast technicians or engineers, all staff announcers, including announcer-operators employed by Respondent SMG Watertown.

(b) At the Union's request, restore all terms and conditions of employment for unit employees which existed prior to the unilateral changes implemented on or after August 23, 2018, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining. Nothing in this Order is to be construed as requiring Respondent SMG Watertown to cancel any unilateral changes which benefited the unit employees, without a request from the Union.

(c) Make whole the unit employees for any losses suffered by reason of the unlawful changes in terms and conditions of employment, on or after August 23, 2018, with interest, in the manner set forth in the remedy section of this decision.

(d) Compensate all affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each affected employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Watertown, New York, facility copies of the attached notice marked "Appendix A."[88] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by SMG Watertown's authorized representative, shall be posted by SMG Watertown and maintained for 60 days in conspicuous places

[85] I reject SMG Watertown's contention that a make-whole remedy, including restoring Chase, Laverghetta, and Stoffel to their positions, is inappropriate. The argument is premised upon the company's position that it only was obligated to bargain over the effects of its decision to implement voice tracking, meaning a limited *Transmarine* remedy would apply. *North Star Steel Co.*, 347 NLRB 1364, 1371 (2006). Having rejected that position, reinstatement, backpay with interest, and other make-whole remedies are appropriate. *Pan American Grain Co.*, 343 NLRB 318, 318 (2004).

[86] The General Counsel seeks a notice reading to remedy the Respondents' unfair labor practices. However, the Board considers this an extraordinary remedy that is properly ordered only in particularly egregious cases. See *El Super,* 367 NLRB No. 34, slip op. at 1 (2018); *AdvancePierre Foods, Inc.,* 366 NLRB No. 133, slip op. at 5–6 (2018). I find the Respondents' violations in the present case are not numerous or egregious enough to warrant notice reading and can be adequately addressed by the Board's standard remedies for the violations found.

[87] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[88] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if SMG Watertown customarily communicates with its employees by such means. Reasonable steps shall be taken by SMG Watertown to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, SMG Watertown has gone out of business or closed the involved facilities, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by SMG Watertown at any time since August 16, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Respondent Stephens Media Group–Massena, LLC of Massena, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees due to their union activity.

(b) Refusing to meet at reasonable times with the Union for the purpose of negotiating a successor collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith and at reasonable times with the Union as the exclusive collective-bargaining representative of the employees in the following, appropriate unit concerning terms and conditions of employment until a full agreement or bona fide impasse is reached, and, if an understanding is reached, embody the understanding in a signed, written agreement:

> All Announcer-Operators and Technician-Announcers (Group I and II) employed by Respondent SMG Massena.

(b) Within 14 days from the date of this Order, offer David Romigh reinstatement to his former position or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

(c) Make David Romigh whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Compensate David Romigh for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each employee.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of David Romigh and, within 3 days thereafter, notify him in writing that this has been done and that these unlawful acts will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Massena, New York, copies of the attached notice marked "Appendix B."[89] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent SMG Massena's authorized representative, shall be posted by Respondent SMG Massena and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent SMG Massena customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent SMG Massena to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent SMG Massena has gone out of business or closed the facilities involved in these proceedings, Respondent SMG Massena shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent SMG Massena at any time since June 8, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps Respondent SMG Massena has taken to comply.

Dated, Washington, D.C. January 24, 2020

## APPENDIX A

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[89] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their union activities, including whether they are willing to cross a picket line in the event of a strike.

WE WILL NOT unilaterally change your terms and conditions of employment, without first bargaining with the National Association of Broadcast Employees and Technicians–Communications Workers of America, AFL–CIO (the Union) to an overall good-faith impasse for a collective-bargaining agreement.

WE WILL NOT bypass the Union and deal directly with bargaining unit employees to establish or change their working conditions.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, before implementing any changes to their wages, hours, or other terms and conditions of employment:

All broadcast technicians or engineers, all staff announcers, including announcer-operators employed by Respondent SMG Watertown.

WE WILL, at the Union's request, restore all terms and conditions of employment for unit employees which existed prior to the unilateral changes implemented on or after August 23, 2018, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining and We will not cancel any unilateral changes which benefited the unit employees, without a request from the Union.

WE WILL make you whole, with interest, for any losses suffered by reason of our unlawful changes in your terms and conditions of employment made on or after August 23, 2018.

STEPHENS MEDIA GROUP—WATERTOWN, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-226225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees due to their union activity.

WE WILL NOT refuse to meet at reasonable times with the National Association of Broadcast Employees and Technicians–Communications Workers of America, AFL–CIO (the Union) for the purpose of negotiating a successor collective-bargaining agreement.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith and at reasonable times with the Union as the exclusive collective-bargaining representative of the employees in the following, appropriate unit concerning terms and conditions of employment until a full agreement or bona fide impasse is reached, and, if an understanding is reached, embody the understanding in a signed, written agreement:

All Announcer-Operators and Technician-Announcers (Group I and II) employed by Respondent SMG Massena.

WE WILL offer David Romigh immediate and full reinstatement to his former position or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make David Romigh whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge of him due to his union activity.

WE WILL remove from our files any references to the unlawful discharge of David Romigh and we will notify him in writing that this has been done and that this unlawful act will not be used against him in any way.

STEPHENS MEDIA GROUP – MASSENA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-226225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.